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# A Subject Matter Approach to Hearsay Reform

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# A SUBJECT MATTER APPROACH TO HEARSAY REFORM

Roger Park\*

## INTRODUCTION

Abolition of the hearsay rule would be another step in what might be termed the Benthamite revolution in the law of evidence. Whether or not they can be traced to his influence, many of the developments of the last hundred years have been consistent with Bentham's position

[t]hat, merely with a view to rectitude of decision . . . no species of evidence whatsoever, willing or unwilling, ought to be excluded: for that although in certain cases it may be right that this or that lot of evidence, though tendered, should not be admitted, yet, in these cases, the reason for the exclusion rests on other grounds; viz. avoidance of vexation, expense, and delay.<sup>1</sup>

While exclusionary rules based upon extrinsic policy have survived and sometimes flourished,<sup>2</sup> those that exclude testimony as flawed by human weakness have decayed or disappeared. The past century has seen the end of rules making parties,<sup>3</sup> interested persons,<sup>4</sup> and felons<sup>5</sup>

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1. 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 1 (London 1827). On Bentham's influence, see Keeton & Marshall, *Bentham's Influence on the Law of Evidence*, in JEREMY BENTHAM AND THE LAW 79 (1948).

Bentham himself may not have followed the full implications of the quoted passage in his prescription for hearsay reform. He did not advocate complete abolition of the rule against hearsay, but rather a rule of preference, under which hearsay would be admitted if the declarant was unavailable. See Chadbourn, *Bentham and the Hearsay Rule — A Benthamite View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 939 (1962); W. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 40 (1985).

2. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (expanding protection of privilege against self-incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (rule excluding evidence seized in illegal search applied to states); cf. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (adopting broad view of attorney-client privilege in corporate context); Schwartzstein, *The Accountant-Client Privilege*, in *TESTIMONIAL PRIVILEGES* 205, 205-06, 218 (S. Stone & R. Liebman eds. 1983); Morse & Zucker, *The Journalist's Privilege*, in *id.* at 407, 423-24 (noting that many states have recognized new privileges for journalists and accountants). But see *Harris v. New York*, 401 U.S. 222 (1971) (illegally obtained confessions admissible to impeach); *Trammel v. United States*, 445 U.S. 40 (1980) (placing limits on marital privilege).

3. See 2 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* §§ 576-577 (3d ed. 1940) [hereinafter WIGMORE ON EVIDENCE].

4. *Id.*

5. See *id.* § 519. Wigmore specifically gave Bentham's "irresistible" attack credit for the movement that led to the disappearance of the disqualification for persons who had been convicted of a crime. *Id.* at 610.

incompetent; more recently, in many jurisdictions, the principle has swept away the dead man's statute<sup>6</sup> and the incompetency of insane persons, infants, and intoxicated persons.<sup>7</sup> The testimony has been admitted on the principle, often regarded as virtually self-evident, that it is better to admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier is deprived of information.

Academic commentators have generally supported this principle, and have sought to use it as a basis for admitting hearsay more freely. While a newcomer to hearsay might suppose that the hearsay rule was the creation of a law professor in search of tricky classroom hypotheticals, in actuality the legal scholars of this century have tended to be supporters of simplification or abolition,<sup>8</sup> while the practicing bar has tended to defend the rule and tolerate its intricacies.<sup>9</sup> In 1942, the

6. Dead man's statutes prohibit testimony by an interested party about transactions with a deceased person in an action initiated or defended by the executor or administrator of the decedent's estate. They are intended to prevent fraud by the survivor. Twenty states repealed their dead man's statutes in conjunction with adoption of the Federal Rules of Evidence, *see* Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1336-37 (1985), and others have mitigated the effect of the statute by substituting a requirement of corroboration for an absolute rule of incompetency, *see* C. MCCORMICK, MCCORMICK ON EVIDENCE § 65, at 160 (E. Cleary 3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE].

7. Under the Federal Rules of Evidence, insane persons, children, and intoxicated persons are competent as witnesses; their conditions go to the weight, not the admissibility, of their testimony. *See* FED. R. EVID. 601. At least 19 states have adopted rule 601's position on competency, but a number of others retain disqualifications for persons whose mental state or immaturity render them unable to testify accurately. *See* Wroth, *supra* note 6, at 1336-37; MCCORMICK ON EVIDENCE, *supra* note 6, § 62.

8. *See, e.g.*, 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8(c), at 642-45 (Tillers rev. ed. 1983) [hereinafter WIGMORE (Tillers ed.)]; 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1427, 1576 (Chadbourn rev. ed. 1974) [hereinafter WIGMORE (Chadbourn ed.)]; Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 334-35 & nn.71-87 (1961); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 300-305 (1954); J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 147-65 (1947); Morgan, *Foreword to MODEL CODE OF EVIDENCE* 36-50 (1942); *id.* at 217-24 (introductory note to hearsay chapter); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 918-22 (1937).

However, scholars who have written of hearsay as an aspect of the constitutional right to confrontation have often taken a different attitude, advocating interpretations that would lead to substantial exclusion of hearsay. *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 129 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 91-92 (1971); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 236-38 (1968); Note, *Constitutional Law — Confrontation Clause — Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination*, 31 VAND. L. REV. 682, 694 (1978). Other confrontation clause commentators have advocated a relatively strict attitude toward hearsay when the declarant is available. *See* Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979); *cf.* Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986) (considers types of hearsay that should be exempt from the unavailability requirement).

9. *See* authorities cited at notes 27, 31, 43 & 45 *infra*.

American Law Institute's Model Code of Evidence proposed a sweeping change, under which hearsay would have been freely admitted when the declarant was unavailable.<sup>10</sup> The Model Code was never adopted in any state, partly because of its radical attitude toward hearsay reform.<sup>11</sup> The fate of the 1953 Uniform Rules of Evidence, which offered a more limited version of hearsay reform,<sup>12</sup> was almost as dismal.<sup>13</sup> In 1973, the Supreme Court sought to use its rulemaking power to accomplish a limited relaxation of restrictions on admission of hearsay,<sup>14</sup> but Congress prevented the Court's Rules from going into effect and subsequently rewrote them. The Federal Rules of Evidence emerged from Congress in 1975 with most of the traditional limitations on the reception of hearsay intact, though Congress permitted the Rules to contain residual exceptions, hedged with limitations, that may have given courts greater freedom to admit hearsay that does not fall under traditional exceptions.<sup>15</sup> Thus, while we have seen steps toward freer admissibility, radical reform has fallen short of the goals set by its proponents, and it has fallen far short of the

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10. Rule 503 of the Model Code of Evidence provided that "[e]vidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

11. See 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5005, at 88-89 (1977); Chadbourn, *supra* note 1, at 945 and authorities cited therein.

12. Rule 63(4)(c) of the Uniform Rules provided an exception, applicable when the declarant was unavailable as a witness, for

a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.

UNIF. R. EVID. 63(4)(c) (1953) (superceded 1974).

13. See 21 C. WRIGHT & K. GRAHAM, *supra* note 11, § 5005, at 89-91 (reporting that in the 15 years after they were approved, the Uniform Rules were adopted in only two states).

14. In the version of the Federal Rules of Evidence originally promulgated by the Supreme Court, the residual exceptions to the hearsay rules were more liberal in scope than the ones that eventually emerged from Congress. They contained no notice provision or requirement that the evidence be superior to other means of proof; the residual exceptions required only that a statement have guarantees of trustworthiness that were "comparable" to those of the established exceptions. See FED. R. EVID. 803(24), 804(b)(6) (Supreme Court Proposed Draft 1973), reprinted in 2 J. BAILEY & O. TRELLES, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc. 7, at 32-33 (1980) [hereinafter BAILEY & TRELLES]. For the more limited residual exception that emerged from Congress, see text at note 15 *infra*. The Supreme Court proposal also provided that statements of recent perception of unavailable declarants be admitted. FED. R. EVID. 804(b)(2) (Supreme Court Proposed Draft 1973), reprinted in BAILEY & TRELLES, *supra*, at 33. This exception was eliminated by Congress.

15. The residual exceptions now provide for the reception of [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under [the residual exceptions] unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the

changes in other areas where evidence was once excluded to protect juries from their own mistakes.

None of the three major reform proposals — the Model Code, the Uniform Rules, or the original Federal Rules — incorporated a systematic distinction between civil and criminal cases. The thesis of this article is that this distinction should be adopted. This article will explore the reasons for excluding hearsay, and conclude that they support different sets of rules in civil and criminal cases. In civil cases, rules excluding hearsay should be curtailed. Hearsay that fits under an established exception should be admitted, and other hearsay, without discretionary screening by the trial judge, should be admitted on proper notice. In criminal cases, however, the conventional reasons for excluding hearsay apply more strongly, and the hearsay rules serve the additional function of shielding the accused against misuse of governmental power. The principal features of the present rules should be retained, and rulemakers should consider codifying incremental changes that tailor the rules so that they deal more particularly with issues that arise in criminal cases.

## I. JUSTIFICATIONS FOR ADMITTING OR EXCLUDING HEARSAY

The primary argument for admitting hearsay is simple and powerful: hearsay can be convincing evidence, and it is the sort of evidence on which we routinely rely in the most important affairs of home, state, and business.<sup>16</sup> This argument has its greatest force when the hearsay declarant is unavailable, and the choice is between admitting the hearsay declaration or having nothing at all. In such circumstances, the proponents of free admission argue, doubts about the reliability of hearsay should go to its weight, not its admissibility, and the trier of fact should be trusted to give the evidence its proper value.<sup>17</sup>

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adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.  
FED. R. EVID. 803(24), 804(b)(5).

The specific recognition of residual exceptions may have encouraged reception of hearsay that does not fall under traditional exceptions. However, some courts had already recognized a common-law power to admit reliable hearsay that did not fit the traditional exceptions. *See, e.g., Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961). The residual exceptions, by including limitations such as notice, may have restricted this power rather than enlarging it.

16. *E.g., J. FRANK, COURTS ON TRIAL* 123 (1949); A. OSBORN, *THE MIND OF THE JUROR AS JUDGE OF THE FACTS, OR, THE LAYMAN'S VIEW OF THE LAW* 51-52 (1937); McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L. REV. 661, 671 (1942). *See also Davis, Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689 (1964).

17. *See, e.g., James, The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788, 794-95 (1940); Note, *The Theoretical Foundations of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1804-07 (1980).

Even when the declarant is available, however, use of hearsay may be the most convenient method of producing testimony, and the opportunity of the opponent to call the declarant for cross-examination gives the opponent a means of ensuring that the facts are adequately explored.

Even beyond this principal argument for receiving hearsay, there are worthy secondary arguments. The Anglo-American tradition of oral proceedings is arduous for witnesses, who would be saved vexation, expense, and inconvenience if their testimony could be taken in the form of affidavit or deposition. Moreover, the exclusion of hearsay can encourage the intimidation of witnesses, or at least deprive the courts of means of countering it. For example, a criminal defendant may use threats or violence against a witness who has given a statement to the prosecution, and if the witness recants or disappears, the hearsay rule will frequently prevent the statement from being used in evidence.<sup>18</sup> Finally, abolition of the hearsay rule, with its many exceptions and complicated quiddities, would greatly simplify the law of evidence.<sup>19</sup> It would also allow witnesses to tell their stories in a more natural fashion, and prevent them from being confused by admonitions from the bench.<sup>20</sup>

While the arguments for admitting hearsay are relatively simple, arguments for excluding it tend to be subtle and procedurally complex. The conventional explanation for the exclusion of hearsay centers on the danger of admitting evidence whose reliability has not been tested. Courtroom witnesses testify under oath, in the presence of the trier, and subject to cross-examination. Hearsay declarants avoid these courtroom safeguards, which both encourage witnesses to be accurate and expose defects in their credibility. Cross-examination is especially valuable for testing credibility because it explores weaknesses in a declarant's memory, perception, narrative ability, and sincerity. Thus, hearsay's fundamental evidentiary flaw is the absence of an opportunity to reveal an out-of-court declarant's weaknesses through

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18. See M. GRAHAM, WITNESS INTIMIDATION xi-xii, 125-27 (1985).

19. Comment, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609, 628 (1974). Cf. P. MURPHY & D. BARNARD, *Evidence and Advocacy*, 19 (1984):

There should probably be an organisation called "Hearsay Anonymous." Membership would be open to those judges, practitioners and students (not to mention occasional law teachers) to whom the rule against hearsay has always been an awesome and terrifying mystery. Like its partner in terror, the rule against perpetuities, the rule against hearsay ranks as one of the law's most celebrated nightmares. To many practitioners, it is a dimly remembered vision, which conjures up confused images of complex exceptions and incomprehensible and antiquated cases.

20. LAW REFORM COMMITTEE, THIRTEENTH REPORT, ¶ 40 (1966); cf. 5 WIGMORE (Chadbourn ed.), *supra* note 8, § 1427, at 264 (arguing for flexibility in use of the hearsay rule in combination with rigorous cross-examination to expose weaknesses in the testimony).

cross-examination.<sup>21</sup>

Wigmore, a leading exponent of this explanation, tried to show that the lack of opportunity to test reliability with cross-examination was the *sole* basis for the hearsay ban.<sup>22</sup> He disparaged jurists who said that hearsay statements should be excluded because the in-court witness might report them inaccurately, or because admission of hearsay might lead to fraud, by cataloguing quotes from their opinions under the label "Spurious Theories of the Hearsay Rule."<sup>23</sup> Other scholars have expressly or implicitly supported this view.<sup>24</sup>

This "untested declarant" theory of hearsay does not tell the whole story about why hearsay is excluded. The history of the hearsay rule indicates that lawmakers had a number of other concerns,<sup>25</sup> and these concerns are reflected in the structure of the hearsay rule and its exceptions.<sup>26</sup>

The first of these additional concerns is the danger that the in-court witness will inaccurately report the out-of-court statement. This raises different considerations than does concern about the accuracy of the out-of-court declarant. The witness reporting the declarant's out-of-court statement is in court, under oath, and subject to cross-examination. These safeguards are supposed to encourage accurate reporting and, in any event, give the trier ample basis for deciding whether the witness is describing the hearsay statement accurately. Nonetheless, lawyers and judges have often supported exclusion on grounds that the in-court witness may be inaccurate.<sup>27</sup> This view is in con-

21. See, e.g., G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159-60 (1978); 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1362, at 7.

22. 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1362, at 7. Though Wigmore offered this explanation for excluding hearsay, he himself ultimately became an advocate of reform that would have given trial judges much more leeway in receiving hearsay. See *id.* § 1427.

23. *Id.* § 1363.

24. See, e.g., Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974); G. LILLY, *supra* note 21, at 159-60.

25. See text at notes 27-56 *infra*.

26. See text at notes 67-152 *infra*.

27. See, e.g., *Report of Committee on Administration of Justice on Model Code of Evidence*, 19 CAL. ST. B.J. 262, 274 (1944) [hereinafter *Report*]. After first noting that the accuracy of hearsay statements cannot be tested by cross-examination, the Committee wrote:

But the real objection goes even deeper. If cross-examination were to be done away with entirely and the truth of an issue were to be determined wholly upon the direct examination of witnesses produced by each party, still we would be as strongly opposed to the proposed rule. We believe that experience has shown that, laying aside entirely questions of perjury, corrupt motives or interest in one party or the other, that one of the most common occurrences is for one man to misunderstand the statements or declarations of another. We believe that few days pass that any lawyer or layman, if he will search his mind, will not recall some instance in which an associate or member of his family has attributed to him statements that were inaccurate. We do not believe there is a trial lawyer of any great experience who has not learned that in a majority of cases when a client asserts that John Jones was present and will fully corroborate him, the client, and recites what Jones will bear witness



formity with the layperson's notion of the dangers of hearsay — exemplified by the maxim “a tale twice told is a tale altered” — so it is not surprising that it is reflected in the law as well.

This justification for excluding hearsay depends upon the belief that a witness describing an out-of-court statement is likely to be less reliable than a witness describing nonverbal events, or at least that cross-examination will be less effective on a witness to a statement. This belief may arise from a sense that human memory does not record verbal information as accurately as visual information.<sup>28</sup> Speech is often difficult to perceive, and people tend to hear what they want to hear. Moreover, as Lempert and Saltzburg point out,<sup>29</sup> minor mistakes in perceiving statements can radically change the meaning of what was said — as would be the case, for example, if a witness believed that the declarant had said “does” when in fact the declarant said “doesn’t.”

The danger that the in-court witness will distort or fabricate a statement is increased by the difficulty of detection. Under a condition of free admissibility of hearsay, the person who wanted to concoct a hearsay statement would be free to choose a time and place at which no one was present but the witness and the supposed declarant, and thus it would be difficult to show that the statement was never made, especially if the declarant was no longer available.<sup>30</sup> Moreover, it is

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to, that when John Jones is interviewed he gives an entirely different version from that of the client.

See also authorities cited in note 31 *infra*.

Some academic commentators have accepted the danger of misreport by the in-court witness as one of the bases for excluding hearsay. See McCORMICK ON EVIDENCE, *supra* note 6, § 245, at 727; R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520-21 (2d ed. 1982).

28. For a commentator who advances this theory, see Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 19. Stewart states that “[p]eople generally retain verbal descriptions [sic] of events less accurately than they do visual perceptions,” and cites G. ALLPORT & L. POSTMAN, THE PSYCHOLOGY OF RUMOR 59-60 (1947). However, the Allport and Postman distinction between “individual memory” (the report of a person with first-hand knowledge) and “social memory” (reports transmitted through a group) provides, at best, only indirect support for this hypothesis. Allport and Postman noted errors in serial reproduction of drawings, *id.* at 57-59, as well as in serial reproductions of oral statements, and they did not directly compare the accuracy or retrieval of visual and verbal information. Compare P. Miene, *Memory for Verbal Statements vs. Memory for Visual Observations* 3 (1986) (unpublished manuscript on file at University of Minnesota Law School Library), which reviews the literature and concludes: “In general, there appears to be no empirical validation of the assumption that the encoding and retrieval of out-of-court visual observations is more accurate than for out-of-court statements.”

29. R. LEMPERT & S. SALTZBURG, *supra* note 27, at 520.

30. *Cf. id.* at 520-21:

Significant statements are often directed at just one person, while significant events are often observed by many. Thus the possibility of questioning a misreported statement through the testimony of other witnesses will generally be less than the possibility of questioning an erroneous observation through the testimony of others. Furthermore, it will be particularly hard to prove perjury when statements are attributed to an anonymous or unavailable declarant, so the temptation to perjury may increase.

difficult to cross-examine someone who is only reporting another's out-of-court statement. As Chief Justice Kent wrote,

A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.<sup>31</sup>

The two risks I have mentioned — inaccuracy of a declarant's out-of-court statement and inaccurate testimony by an in-court witness about another's out-of-court statement — create a danger that unreliable evidence will be presented to the trier. Mere unreliability, however, is a weak basis for exclusion; after all, evidence of doubtful reliability is routinely admitted in modern courts, on the assumption that the trier can recognize the infirmities in the testimony and take them into account in evaluating it. Thus, testimony of an interested party, even one who is a convicted perjurer, is received though it may be less reliable than the hearsay statement of a disinterested observer. Mere unreliability might be a sufficient basis for a rule of preference, which excludes hearsay when better evidence is available in the form of in-court testimony by the declarant. It cannot, however, explain our present hearsay rule, which often excludes hearsay even when the declarant is unavailable and the choice is between admitting hearsay or hearing nothing on the point at all. When the declarant is unavailable, unreliability cannot be a sufficient basis for exclusion unless we

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31. *Coleman v. Southwick*, 9 Johns. 45, 50 (N.Y. Sup. Ct. 1812) (quoting source not indicated). See also R. LEMPERT & S. SALTZBURG, *supra* note 27, at 520 ("Cross-examination is less likely to be effective in testing reports of statements than in testing reports of more complex events."); *id.* at 520 n.38:

If a witness claims to have heard but a single statement, he may plausibly claim that was all that was said to him . . . . While the examiner may question the witness about his surroundings, a failure to closely observe one's surroundings does not necessarily suggest inattention to matters overheard. The witness must, of course, convince the jury that he was in a position to overhear, but usually this will only involve establishing his distance from the conversation. The attorney who investigates the scene is unlikely to find barriers to sound which would render certain versions of how a statement was heard suspect. Unreliable aspects of visual observations are much more susceptible to exposure through cross-examination. If a witness remembers only a single aspect of an event, that in itself is suspect.

For other expressions of fear about fabrication by the in-court witness, see, for example, *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 436 (1836) (Story, J.) (besides lacking oath and cross-examination, the fault of hearsay is "that it is peculiarly liable to be obtained by fraudulent contrivances"); *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813) (Marshall, J.) (speaking of the "frauds which might be practiced" in the absence of the hearsay rule); *Englebreton v. Industrial Accident Commn.*, 170 Cal. 793, 151 P. 421, 423 (1915) (Shaw, J.) (same); *Report*, *supra* note 27, at 274-75 ("[W]hen the self-interest which actuates parties to litigation and their friends and witnesses is considered, the chance of perpetration of actual fraud by either or both parties equals, if it does not exceed, the chance of inaccuracy that would be inherent in hearsay testimony of truthful witnesses."). Cf. Morgan, *Foreword to MODEL CODE OF EVIDENCE* 6 (1942) (prevention of perjury "is the notion that is constantly urged against the expansion of exceptions to the hearsay rule").

assume that the jury<sup>32</sup> is likely to overvalue the testimony. Moreover, we must assume that the jury will overvalue the testimony to such an extent that it is better to exclude the testimony than to admit it and to have it be given too much respect. In other words, we must suppose not only that the jury will overvalue the testimony, but that the discrepancy between the value that the jury assigns to the testimony and its true value will be so great that it is better not to hear the testimony at all.

The validity of this supposition has remained a matter of fireside induction. Perhaps it would be possible to test its validity by social science methods, but so far hearsay experiments have focused on matters such as the validity of particular exceptions, not upon the question whether jurors overvalue hearsay testimony.<sup>33</sup> The lack of empirical data, however, has not foreclosed debate. The view that the jury is not qualified to assess hearsay evidence has frequently been attacked, either on grounds that the jury can accurately assess the testimony,<sup>34</sup> or that any error it makes is likely to be minor in comparison to the value of the testimony.<sup>35</sup> Proponents of free admission draw tempting comparisons between the use of hearsay in ordinary life and its use in

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32. In this article, the fact finder is usually assumed to be the jury, since the hearsay rule, while theoretically applicable in both bench trials and jury trials, has far less force in bench trials. In bench trials, the judge who erroneously admits hearsay is unlikely to be reversed because of the doctrine that if the verdict is supported by admissible evidence, the judgment will not be reversed because the judge received evidence that was inadmissible. This doctrine has led to a more relaxed attitude toward hearsay in nonjury cases. See Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362 (1970).

33. See generally Stewart, *supra* note 28, and authorities cited therein. My own review of the literature has failed to reveal any direct study of jury overvaluation of hearsay. Cf. Kelman, *Trashing*, 36 STAN. L. REV. 293, 319 (1984) (using hearsay evaluation as an example of a subject on which experiments are possible but will never be carried out). It is possible that research on fundamental attribution error will provide some insights into jurors' tendencies to overrate the sincerity of declarants who have not been contradicted or cross-examined, but it is difficult to generalize from current research to conclusions about the use of hearsay. Cf. Jones, *The Rocky Road from Acts to Dispositions*, 34 AM. PSYCHOLOGIST 107 (1979) (arguing that the functional effects of attributional error are unclear).

34. See Weinstein, *supra* note 8, at 335; Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372 (1985).

35. See Comment, *supra* note 19; Note, *supra* note 17, at 1789-90, 1815. The latter Note attempts to quantify the point that jury error is minor, and to show that it is unlikely that jury mistakes in evaluating testimony will be serious enough to justify exclusion. The Note appears to take the position that exclusion is not justified unless the jury mistakenly assigns an item of evidence a value that is at least twice its real value. Otherwise, the evidence should be admitted, since the "gap" between real value and assessed value is less than the real value of the evidence. Thus, if on a scale of 100 the real value of the evidence is 51, the evidence should never be excluded since, even if the jury assigns it a value of 100, the "gap" between real value and assigned value is only 49, which is less than the real value of the evidence. *Id.* at 1789-90. This seems wrong, at least if the numbers are taken as representing probabilities, and it is hard to see what else they could be. Suppose, for example, that in a criminal case the only evidence of guilt is a hearsay statement, and the jury considers the statement to be absolutely reliable proof that the defendant committed the crime, while actually the evidence establishes a 51% probability that defendant committed the crime. Since the standard of proof is guilt beyond a reasonable

the courtroom. McCormick noted that if the hearsay rule were applied out of court, it would "bring all business to a standstill."<sup>36</sup> Writing from a layperson's point of view, a former juror has put the case well:

The jurors who are new observers to these proceedings are astonished at some of the things that are done here but are more astonished at some of the things that are not permitted. One of the more intelligent members calls attention in a most emphatic manner to the fact that in investigations anywhere out of court, everybody connected with the affair in any way, directly or remotely, would without restraint be asked to tell everything about it that would throw any light on the problem.

A manufacturer or business man, or special investigator or arbitrator, who seeks to discover all the facts in any matter under inquiry, does not tie his own hands by certain of these artificial rules formulated by those dead and gone to their reward years and years ago.

To admit any tinge of hearsay, we learn is a positive error that is not negligible, and there seems to be a special antipathy to this sort of testimony when, as a matter of fact, in the ordinary affairs of life hearsay is a well-recognized source of information, not of course to be implicitly depended upon but often helpful as one of the steps in an investigation.

Some of these rules apparently are based on the assumption that those who listen to the evidence, our jury for example, are of very low mentality and cannot distinguish between the force of what one himself knows and what he heard said with the information as to who said it.<sup>37</sup>

To many, Bentham's more general point about the law of evidence — that in finding the truth, the sages of the law have displayed less wisdom than the illiterate peasant doing justice within the circle of his family — must seem particularly applicable to the hearsay rule.<sup>38</sup>

Perhaps, however, there is more to be said about the risk of misvaluation that one finds in the literature advocating radical reform of the hearsay rule. Jurors may use hearsay intelligently in ordinary life, but a trial is not ordinary life. They must judge the motives and truth-

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doubt, justice would be served by excluding the evidence, even though the jury's assessment of it (100%) creates a gap (49%) that is smaller than its real value (51%).

36. McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L. REV. 661, 671 (1942).

37. A. OSBORN, *supra* note 16, at 51-52. See also J. FRANK, *supra* note 16, at 123:

Now doubtless hearsay should often be accepted with caution. But 90% of the evidence on which men act out of court, most of the data on which business and industry daily rely, consists of the equivalent of hearsay. Yet, because of distrust of juries — a belief that jurors lack the competence to make allowance for the second-hand character of hearsay — such evidence, although accepted by administrative agencies, juvenile courts and legislative committees, is (subject, to be sure, to numerous exceptions) barred in jury trials. As a consequence, frequently the jury cannot learn of matters which would lead an intelligent person to a more correct knowledge of the facts.

See also Davis, *supra* note 16 (arguing that probative value, and not hearsay, should be the rule for admissibility).

38. 1 J. BENTHAM, *supra* note 1, at 5-6. Bentham added: "The peasant wants only to be taught, the lawyer to be untaught: an operation painful enough, even to ordinary pride; but to pride exalted and hardened by power, altogether unendurable." *Id.* at 8 (emphasis in original).

fulness of persons whom they would ordinarily never meet, in a formal, ritualized proceeding unlike anything in their ordinary affairs, a proceeding in which finding the truth may require an understanding of institutional practices with which they have little or no dealings. The problem is particularly sharp in criminal cases.<sup>39</sup>

Moreover, it is misleading to write about the valuation of hearsay as if the trial involved only a single piece of evidence. The jury is not usually confronted with a single hearsay statement that it must, in isolation, decide to credit or not. Hearsay evidence often must be weighed against other evidence, including testimony by in-court witnesses. Weighing a hearsay statement against contradictory testimony that has been subjected to courtroom cross-examination is, obviously, unnecessary in ordinary life.

In assessing hearsay statements, jurors may also be faced with unfamiliar tasks in determining whether the statement, as reported to them, fully and accurately portrays the declarant's observations. They may be unfamiliar with ways in which professional statement-takers, with an eye to litigation, can twist and distort without actually lying.<sup>40</sup>

Fabricated statements in criminal cases raise a special problem. The trier of fact may be quite aware that witnesses in criminal cases often fabricate. It is, however, sometimes a heroic task to decide that a particular witness has fabricated a particular statement, especially since cross-examination may be less effective in revealing outright fabrication than in revealing other testimonial defects.<sup>41</sup> This problem cuts both ways. A jury may be quite willing to believe that a defen-

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39. See text at notes 181-209 *infra*.

40. The problem is exacerbated in situations where one of the attorneys has had the opportunity to prepare the out-of-court declarant, as when the proffered statement is an affidavit prepared by the attorney and signed by the witness. Here, both sides have "sandpapered" their witnesses, but only one has had the opportunity to expose the sandpapering through cross-examination. Jurors may not be familiar with sophisticated ways of implying something without actually saying it, or of omitting information in a way that makes the affidavit literally true but false in its implications. For example, an affidavit saying that ballistics tests were "consistent" with the proposition that the bullet came from the defendant's pistol might mean only that the bullet could have come from the defendant's pistol or any other pistol. Yet the statement could be interpreted by the jury to mean that the tests proved that the bullet came from the defendant's pistol. Cf. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 5 (1937) (describing ballistics testimony in the Sacco-Vanzetti case). Similarly, an affidavit stating that the driver applied the brakes "at the approximate point of impact" could mean that the driver applied the brakes only after running down the pedestrian, but might not be taken in that sense.

41. See, e.g., Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 186 (1948):

[I]f a witness is willing to commit perjury and counsel is willing to co-operate, neither oath nor cross-examination will be of much avail to expose the willful falsehood unless either witness or counsel is unusually stupid. . . . Although the exposure of willful falsehood is the most dramatic function of skillful cross-examination, it is very rarely demonstrated.

Accord Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 690-91 and authorities cited in n.22 (1962).

dant would fabricate evidence to escape conviction. Yet when that evidence, if believed, establishes a complete defense, it may raise a reasonable doubt despite skepticism about defendants in general — particularly when the jury has been told time and again to ignore the fact that the defendant has been arrested and charged and to give him the presumption of innocence.<sup>42</sup>

The danger that the trier of fact will give too much weight to the evidence is not the only reason for excluding hearsay. Bar groups and others have advanced a variety of additional concerns. In particular, bar groups have repeatedly expressed the fear that if hearsay were freely admitted, trial preparation would become more difficult, and the danger of unfair surprise at trial would increase.<sup>43</sup>

The danger of unfair surprise cannot be dismissed lightly. The unitary nature of the American trial makes surprise a greater danger than in other systems, where adjournments and continuances can mitigate its effect. Attorneys need time and preparation to be ready to impeach witnesses, to contradict them with the testimony of others, and to construct arguments dealing with their testimony. The attorney may be prepared to impeach or contradict the witness on the stand, but not to do so for declarants whose out-of-court statements come in unexpectedly through the mouth of the witness. Of course, surprise can be avoided or made less likely by discovery and pretrial notice, but those safeguards add to the burden and expense of pretrial preparation.

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42. The problem has arisen in cases involving witnesses who testify that third parties have confessed to the crime with which defendant is charged. Of course, juries reject complete-defense evidence every day, as when they refuse to believe alibi witnesses. When witnesses report in detail on their own observations of nonverbal conduct, however, the cross-examiner may be able to do more to undermine the testimony than when a witness reports an out-of-court statement. In the latter case, the witness who has testified to a perfect opportunity to hear the statement can then entrench himself in the assertions of the out-of-court declarant, without resolving any difficulties. See text at note 31 *supra*.

43. See *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., 74 (1973) [hereinafter *House Evidence Rules Hearings*] (statement of American College of Trial Lawyers asserting that broad admissibility of hearsay will "make it impossible for a trial counsel adequately to prepare the case for trial since he will not and cannot know what evidence he will have to meet until it faces him in the courtroom"), reprinted in 3 BAILEY & TRELLES, *supra* note 14, Doc. 12, at 74; *id.* at 290 (statement of the Study Committee on the Federal Rules of Evidence of the District of Columbia Bar Association asserting that unfairness may result from surprise and a "novel offer" of hearsay evidence); HOUSE COMM. ON THE JUDICIARY, FED. RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 1st Sess., 5-6 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7079 and in 4 BAILEY & TRELLES, *supra* note 14, Doc. 13, at 5-6 (explaining Committee's deletion of residual exceptions on grounds that they would have the effect of "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial"). Cf. *Coleman v. Southwick*, 9 Johns. 45, 50 (N.Y. 1812) (holding that the omission of hearsay testimony could result in unfairness). The final version of the residual exceptions sought to meet the surprise objection by putting in a requirement that notice be given before trial of intent to offer evidence under the exceptions. See FED. R. EVID. 803(24), 804(b)(5).

Also, if radical reform takes the form not of abolishing the hearsay rule but of making the exclusion of hearsay discretionary, surprise can operate in the other direction: the attorney who expected his evidence to be admissible may be surprised by a discretionary exclusion, and unprepared to offer substitute evidence.

Bar groups have also raised the specter of misuse of judicial discretion. Most advocates of hearsay reform would not make hearsay admissible without limit, but would give trial judges discretion to admit or exclude in appropriate cases.<sup>44</sup> The fear of unbridled discretion has been one of the bar's primary reasons for opposing these proposals for broader admission of hearsay.<sup>45</sup>

Radical change in the hearsay rule could have other undesirable effects. For example, the free admission of hearsay might hamper pre-trial dismissal of weak cases. Rule 56 provides that affidavits submitted in support of or opposition to summary judgment motions must be based on personal knowledge and present evidence that would be admissible at trial. Sometimes proponents fail because their affidavits offer nothing but hearsay evidence on an essential element.<sup>46</sup> If the hearsay rule were abolished, a plaintiff resisting a motion for summary judgment would only have to aver that someone had told him that he had observed the crucial fact. In a period of concern about expanding litigation, one might question whether hearsay evidence that is too weak to be received under the existing exceptions ought to be strong enough to allow a party to proceed to trial.

Next, free admission might encourage jury lawlessness. This concern materializes when hearsay evidence enables its proponent to overcome a motion for a directed verdict. The jury, in reaching its decision, may appreciate the unreliability of the hearsay but nonetheless award a verdict in favor of the proponent because it rejects or

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44. See, e.g., Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281 (1980); Weinstein, *supra* note 8; FED. R. EVID. 803(a) (Advisory Comm. Prelim. Proposed Draft 1969), reprinted in 2 BAILEY & TRELLES, *supra* note 14, Doc. 5, at 173.

45. See, e.g., C. WRIGHT & K. GRAHAM, *supra* note 11, at 88 ("[I]t is now part of the lore that the [Model] Code failed because lawyers objected to the power left in the trial judge. While scholars and appellate court judges may be comfortable with the idea, most practicing lawyers are not 'Big Pots' who can count on the trial judge to be benign in his discretion."); *House Evidence Rules Hearings*, *supra* note 43, at 70 (statement of American College of Trial Lawyers opposing broad admissibility of hearsay and condemning increased judicial discretion); *id.* at 91 (statement of Washington State Bar Association opposing proposed residual exceptions on grounds of increased judicial discretion); *id.* at 356 (Statement of Colorado Bar Association opposing residual exceptions on grounds that they inject too much uncertainty and discretion into the law of evidence.); *id.* at 337 (resolution of American Bar Association House of Delegates).

46. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986); *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1267 (S.D.N.Y. 1985), *aff'd.*, 818 F.2d 187 (2d Cir. 1987).

misunderstands the applicable law.<sup>47</sup> Free admissibility of unreliable evidence gives the jury a peg on which to hang a verdict even if it does not believe the unreliable evidence.

Admitting hearsay can also encourage fabrication. This concern about fabrication is often expressed as a concern about misleading the jury, but it deserves to be considered in a broader light; its effect upon accuracy is not its only effect. Suppose that two cases arise in a jurisdiction that has abolished the hearsay rule. In the first, the jury accurately evaluates all the evidence, and correctly awards judgment to the plaintiff on the basis of hearsay evidence. Justice has been done because the hearsay rule was abolished. In the second case, the jury overvalues fabricated hearsay evidence, and as a result incorrectly awards judgment for the plaintiff. An analysis of this situation could conclude that the injustice perpetrated in the second case is evenly balanced by the just result in the first case. Thus, abolition produces the same number of just results as enforcement of the hearsay rule, so nothing has been lost. But this view disregards the basis for each result. An incorrect result is more offensive if it is based upon false proof than if it is based on failure of proof, and the witnesses who have committed perjury are themselves degraded. In short, fabrication is wrong even when it does not lead to an inaccurate verdict.

The hearsay rule has been defended on grounds that it promotes economy and speed in litigation.<sup>48</sup> Impeachment of a hearsay declarant can be more time-consuming than impeachment of a live witness. For example, the live witness may make concessions on cross-examination that render extrinsic impeachment evidence unnecessary. Of course, one can argue that excluding any species of evidence would

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47. Cf. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 930-40 (1971) (raising similar considerations in discussion of dangers of using demeanor evidence as sole basis for surviving directed verdict).

48. See Weinstein, *supra* note 8, at 336. Although he favors liberalization of the hearsay rule, Weinstein recognizes that exclusion of hearsay arguably promotes speed and economy at trial: The second factor [aside from the danger that the jury will misvalue hearsay] is one of trial convenience. Where credibility is assessed primarily on the basis of demeanor, an opposing attorney can see a witness for the first time and cross-examine solely on the basis of trial observation, hints from his client or expert, and what he believes about the witness's background and the facts of the case. It is better if he is prepared in advance, of course — and all the tactics books warn against the danger of unprepared cross-examination. But the trial can go on without any extensive before-trial examination of the witness's background or preparation for proof and disproof of his credibility by other witnesses and documents. This permits cheaper preparation and a shorter trial, and by avoiding the need for continuances to permit investigation it makes the present form of dramatic jury trial more practicable. See also T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 46 (Boston 1826), quoted in James, *supra* note 17:

[S]ince everything would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral questions.



save time, but hearsay seems a particularly good candidate for exclusion because of the other strikes against it. While the matter might be handled by invoking the trial judge's discretion to exclude evidence that is cumulative or a waste of time, it is not always possible to predict how much time will be consumed in impeachment, rebuttal, and counterattacks by the proponent if the door is opened to a given item of hearsay.

The utility of the hearsay rule as time-saver, however, is uncertain. When the rule has the effect of entirely excluding a line of evidence, as when the declarant is unavailable, it may save time and money. When it operates as a rule of preference, requiring the proponent to call the declarant instead of introducing an out-of-court statement, then it may have the opposite effect. The declarant must then endure the inconvenience and vexation of a court appearance. The examination of the declarant at trial may take longer than would introduction of an out-of-court statement incorporated in another witness' testimony, particularly if the opposing party has no extrinsic impeachment evidence.

The hearsay rule has also been defended as a protector of the litigation underdog. Lempert and Saltzburg write that:

[T]he balance of advantage lies with the state in criminal cases and with wealthy organizations in civil actions. Organizations, unlike most individuals, usually have substantial resources available for the generation of evidence and often have the further advantage that litigation and the anticipation of litigation is, for them, routine. This means that organized parties are likely to have access to more hearsay evidence than the individuals they oppose.<sup>49</sup>

This generalization may not apply to all cases. The presentation of live testimony is often more expensive than the presentation of hearsay, and allowing litigants to submit affidavits instead of live testimony might help the underdog in some cases. However, one can hardly quarrel with the position that complete abolition of the hearsay rule would fundamentally change the method of preparation for the American trial, and that the changes would advantage some categories of litigants — particularly the state in criminal cases — more than others.

A related concern involves the possibility that abolition of the hearsay rule would encourage abuse of governmental power in criminal cases. For example, government investigators would have greater

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49. R. LEMPERT & S. SALTZBURG, *supra* note 27, at 521-22 (footnotes omitted). Cf. *House Evidence Rules Hearings*, *supra* note 43, at 92-93 (statement of Frederick D. McDonald); *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 278 (1974) [hereinafter *Senate Hearings*] (testimony of Professor Paul F. Rothstein), reprinted in 4 BAILEY & TRELLES, *supra* note 14, Doc. 14, at 278.

incentive to coerce witnesses or distort statements if out-of-court statements became freely admissible.<sup>50</sup> This concern about abuse of power, which alone might justify distinguishing between the admission of hearsay in civil and criminal cases, will be discussed more fully in Part III of this article.<sup>51</sup>

In a recent article, Professor Charles Nesson suggested still another explanation for the exclusion of hearsay.<sup>52</sup> Professor Nesson rejects the conventional rationale for exclusion, stating that jurors are capable of assessing the reliability of hearsay evidence and "they would undoubtedly be given this task if reliability alone were at stake."<sup>53</sup> He believes that "there must be another, distinct rationale for the hearsay rules."<sup>54</sup> He finds that rationale in the enhancement of the social acceptability of verdicts by protecting them from subsequent attack. After considering and discarding the view that exclusion of hearsay enhances the *immediate* acceptability of verdicts, he decides that the hearsay rules "may be grounded on the legal system's concern for *continuing* acceptance of the verdict."<sup>55</sup> In his view, hearsay and confrontation rules

prevent jurors from basing a verdict on the statement of an out-of-court declarant who might later recant the statement and discredit the verdict. Cross-examination of a declarant minimizes the risk that a verdict will be undercut by ensuring that the declarant cannot easily recant his statement. During cross-examination, the declarant commits his integrity to the accusation; subsequent recantation of the statement would constitute an admission of perjury.<sup>56</sup>

A number of objections can be made to this argument.<sup>57</sup> One is that the stability of verdicts, if affected by the hearsay rule at all,

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50. See *Rules of Evidence, Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 244 (1973) [hereinafter *House Special Subcomm. Hearings*] (statement of Frederick D. McDonald), reprinted in 3 BAILEY & TRELLES, *supra* note 14, Doc. 11, at 244; *House Evidence Rules Hearings*, *supra* note 43, at 92-93 (statements suggesting that power of government investigators would be unduly enhanced by substantive admission of prior inconsistent statements, and that investigators, civil and criminal, would be aware of their increased power and less likely to conduct fair investigations); *Senate Hearings*, *supra* note 49, at 302, 317 (testimony of Herbert Semmel, Washington Council of Lawyers).

51. See text at notes 208-09 *infra*.

52. Nesson, *supra* note 34, at 1372-75. Professor Nesson's article offers helpful insights on much broader topics; his discussion of the hearsay rule is merely presented as one example of the degree to which the desire to produce acceptable verdicts has influenced the development of legal doctrine.

53. *Id.* at 1372.

54. *Id.*

55. *Id.* at 1373 (emphasis in original).

56. *Id.*

57. See Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986).

would seem to be threatened as much by the exclusion as by the admission of hearsay. When hearsay is excluded, there is a danger that declarants whose statements were excluded as hearsay might appear, affirm their statements, and offer to testify at a new trial. Their challenge to the acceptability of the verdict would be more serious than that of recanting declarants whose testimony was admitted, because their position about the facts would have been completely consistent.

Whatever one may think of these specific views, however, a certain degree of skepticism about the professed reasons for excluding hearsay is bound to arise in any thoughtful observer. After reading the legislative history of the Federal Rules of Evidence and the published articles on hearsay reform, one cannot help but be impressed by the degree to which the professional status of commentators seems to have influenced their positions on hearsay. Academicians<sup>58</sup> and student commentators<sup>59</sup> have tended to favor drastic reform leading to much freer admission of hearsay (except for those who have written of hearsay as an aspect of the constitutional right to confrontation, a context in which scholars are more likely to see exclusion as an essential protection for criminal defendants).<sup>60</sup> Judges have tended to favor judicial discretion in admitting and excluding hearsay.<sup>61</sup> Prosecutors have supported receiving more hearsay, citing, among other things, problems caused by intimidation of witnesses who have given prior statements.<sup>62</sup> Bar groups have tended to be procedurally conservative, supporting existing exceptions and opposing creation of drastic new ones.<sup>63</sup> While it is not hard to explain the attitude of judges and prosecutors, the reason for the split between bar groups and academicians is less obvious. If complicated rules of procedure are motivated by distrust,<sup>64</sup> then perhaps the answer is that lawyers oppose discretionary hearsay rules more than scholars because their trial experience has taught

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58. See note 8 *supra*.

59. See, e.g., Note, *supra* note 17, at 1804-07; Comment, *supra* note 19.

60. See note 8 *supra*.

61. This statement must be qualified to some extent, because judicial opinions have often set limits upon the admission of hearsay. However, at the hearings on the Federal Rules of Evidence, the Judicial Conference of the United States favored supporting the retention of broad residual exceptions that would have the effect of conveying substantial discretion. See *House Evidence Rules Hearings*, *supra* note 43, at 296-97 (statement of the Judicial Conference of the United States, Committees on Rules of Practice and Procedure, and on Rules of Evidence).

62. See, e.g., *House Evidence Rules Hearings*, *supra* note 43, at 350-52 (statement of Department of Justice); *Senate Hearings*, *supra* note 49, at 111-14 (statement of W. Vincent Rakestraw on behalf of Department of Justice); *id.*, at 381 (statement of District Attorney, County of Los Angeles). Cf. M. GRAHAM, *supra* note 18, at 125-209.

63. See authorities cited in notes 27, 31, 43 & 45 *supra*.

64. See P. CALAMANDREI, *PROCEDURE AND DEMOCRACY* 83 (1956).

them to doubt the impartiality of judges.<sup>65</sup> The lawyer's sense of professionalism, of possessing a rare and difficult skill, no doubt plays a role as well. The courtroom rituals produced by the rules of evidence are hard to learn and cherished once learned; abolition of the hearsay rule would make a hard-won element of the trial lawyer's training obsolete. It would alter the lawyer's professional life in other ways. There would be less opportunity to display forensic skills in cross-examining witnesses, and trials would lose drama and excitement when documentary evidence was received in lieu of live testimony.

Of course, the possibility that opponents of hearsay reform have been motivated by professional status should not preclude us from giving fair consideration to their explicit rationales in defense of the status quo. There are five major themes present in lawyers' arguments against hearsay reform. First, the conventional academic rationale for excluding hearsay — lack of cross-examination of the declarant — appears frequently in the discourse of lawyers, and must be counted as a major reason for exclusion. Second, concern has frequently been voiced about the danger of misreport and fabrication by the in-court witness. Third, lawyers have often alluded to the danger of surprise at trial. Fourth, lawyers have been concerned that hearsay reform would leave admission or exclusion to the uncontrolled discretion of the trial judge. Finally, concern has been expressed that the relaxation of hearsay rules will facilitate abuse of governmental power in criminal cases. In Part III of this article, I will argue that these five themes apply differently in civil and criminal cases, and that for this reason drastic liberalization of the hearsay rules is justified in civil, but not criminal, cases. First, however, I turn to the existing structure of the hearsay rule itself.

## II. RELATIONSHIP OF JUSTIFICATIONS FOR EXCLUDING HEARSAY TO THE STRUCTURE OF THE HEARSAY RULES

Having outlined the multiple reasons for excluding hearsay by re-

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65. Of the attitude of the bar, Morgan wrote:

[I]t is the disheartening truth that the bar of this country is emphatically antagonistic to any measure which involves any expansion of the authority of the trial judge. . . . There seems to be a settled conviction that the average trial bench of the states contains too many judges of poor education and unsound judgment, to say nothing of instability of character or plain dishonesty.

E. MORGAN, *The Outlook for Reform*, in *THE LAW OF EVIDENCE* 67 (1927).

For examples of the attitude of scholars who have advocated evidence reform, see Ladd, *A Modern Code of Evidence*, 27 *IOWA L. REV.* 213, 219-20 (1942) ("A rational code must be built upon the assumption that cases are tried before a trial judge of reasonable ability and highest integrity . . . ."); Morgan, *Foreword to MODEL CODE OF EVIDENCE* 10 (1942) ("The [Model] Code of Evidence . . . proceeds upon the theory that it is to be administered by an honest and intelligent judge . . . .").

ferring to statements by lawmakers and commentators, and by drawing inferences from the general effect of exclusion, I will now examine specific provisions of the hearsay rule and its exceptions to see what light they throw upon reasons for admitting and excluding hearsay.

Under the untested declarant theory of hearsay exclusion,<sup>66</sup> exceptions to the hearsay rule are justified when circumstances reduce the danger that the trier will give too much weight to a statement that has not been tested by cross-examination. Under this theory, it is the possible unreliability of the out-of-court statement, not any other consideration, that leads to the exclusion of hearsay. The fact that the declarant was not subject to cross-examination (and, secondarily, that the declarant was not under oath and subject to observation by the trier) makes it difficult to assess the declarant's credibility, so hearsay is generally excluded. However, if circumstances surrounding the making of the statement provide a guarantee of trustworthiness, then the need for cross-examination is reduced and an exception may be justified. The case for an exception is bolstered if, in addition, cross-examination is impossible because the declarant is unavailable, so that the choice is between taking the declarant's untested statement or having nothing at all.

Wigmore was a systematic advocate of this view.<sup>67</sup> He wrote that "[t]he purpose and reason of the Hearsay rule is the key to the Exceptions to it." His theory of the "purpose and reason of" the hearsay rule was that "the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination."<sup>68</sup> Sometimes, though, hearsay statements are so trustworthy that cross-examination would serve little purpose; and sometimes cross-examination is impossible, as when the declarant is dead. It is then necessary to take the evidence in its "untested shape" if it is to be heard at all. These two principles — trustworthiness and necessity — justify the creation of hearsay exceptions, especially when the two are combined.<sup>69</sup> In his treatment of each exception, Wigmore first attempted to show that it was justified by the

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66. See text at notes 21-25 *supra*.

67. Wigmore recognized that other theories had influenced lawmakers, but regarded the untested declarant rationale as the key to a true understanding of the hearsay rule. In a section devoted to the question whether one reason for excluding hearsay might be the risk that the in-court witness might inaccurately describe the out-of-court statement, he labeled this justification for excluding hearsay as "spurious." 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1363, at 8. Cf. *id.* § 1477, at 288-89 (claiming that limiting to civil cases the exception for statements of fact against interest cannot be justified on policy grounds).

68. *Id.* § 1420, at 202.

69. *Id.* §§ 1420-1422.

principles of necessity and trustworthiness. The "trustworthiness" that Wigmore was concerned with was the trustworthiness of the *declarant's* statement, not that of the in-court witness reporting the hearsay; the in-court witness, after all, was subject to cross-examination.<sup>70</sup>

A more recent example of this approach may be found in a well-known article by Professor Laurence Tribe.<sup>71</sup> To Tribe, hearsay is suspect because the trier must rely upon the credibility of a person whose statement has not been made in court, under oath and observation, and subject to immediate cross-examination.<sup>72</sup> The exceptions apply to situations in which concern about absence of in-court cross-examination of the declarant is for some reason mitigated. They fall into three categories: Group I, where there is an adequate procedural substitute for in-court cross-examination (*e.g.*, the former testimony exception);<sup>73</sup> Group II, where the party is deemed to have no right to cross-examination (*e.g.*, admissions);<sup>74</sup> and Group III, the largest group, where "specific attributes of the out-of-court act or utterance . . . are thought to reduce the [credibility] weaknesses so substantially that the balance of untrustworthiness and likelihood of probative value favors admissibility of the evidence."<sup>75</sup> Tribe further classifies the potential weaknesses in credibility as "left-leg" weaknesses (insincerity, ambiguity) and "right-leg" weaknesses (poor perception or memory). When circumstantial guarantees of trustworthiness reduce these declarant credibility weaknesses, a hearsay exception is justified. In fact, Tribe declares that "[o]ne major unifying theme suggested by the subgroups is that, in order to overcome a hearsay objection, *one good leg is enough*."<sup>76</sup>

The exclusive focus of Tribe, Wigmore, and others<sup>77</sup> upon the untested declarant theory provides an incomplete picture of the reasons for the hearsay exceptions. While concern about the untested declarant has played an important role, the hearsay rules do, and should, reflect other concerns.<sup>78</sup>

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70. Wigmore recognized that not all of the rules labeled by others as "exceptions" could be explained by saying that circumstantial guarantees of trustworthiness existed. For that reason, he classified admissions not as an exception to the hearsay rule but as an instance in which the hearsay rule was inapplicable because the declarant "does not need to cross-examine himself." 4 WIGMORE (Chadbourn ed.), *supra* note 8, § 1048, at 4-5 (emphasis omitted).

71. Tribe, *supra* note 24.

72. *Id.* at 958.

73. *Id.* at 961-63.

74. *Id.* at 963-64.

75. *Id.* at 964-69.

76. *Id.* at 966 (emphasis in original).

77. See, *e.g.*, G. LILLY, *supra* note 21, at 157-60.

78. Of course, the influence of a particular consideration may not always have been acknowl-

For example, the existence of hearsay exceptions that manifest a preference for recorded statements suggests concern about the danger of misreport and fabrication by the in-court witness. To be sure, oral statements are not excluded categorically by the rule against hearsay, but many of the exceptions to the hearsay rule apply only to documentary or other recorded hearsay.<sup>79</sup> Moreover, even when oral statements pass the hurdle of the hearsay rule, they do not necessarily become admissible. A variety of other rules, not labeled as hearsay, function to create a preference for recorded utterances. Examples include the parol evidence rule,<sup>80</sup> the statute of frauds,<sup>81</sup> rules requiring

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edged or consciously considered. The hearsay rule and its exceptions have developed over centuries, with each exception taking its own peculiar course. Choices about limiting or expanding an exception may have been more palatable to lawyers and judges for reasons that were not recognized or expressed. The absence of an objectionable feature (such as surprise) is not always as obvious as its presence, yet that absence may partly explain why some hearsay exceptions have been acceptable to lawmakers who otherwise oppose admission of hearsay.

79. Using the Federal Rules of Evidence as a guide, we find exceptions applicable only to recorded statements in rule 803(5) (recorded recollection), rules 803(6) and (7) (business records), rule 803(9) (vital statistics), rule 803(10) (absence of public record), rule 803(11) (records of religious organizations), rule 803(12) (marriage, baptismal, and similar certificates), rule 803(13) (family records), rules 803(14) and (15) (documents affecting an interest in property), rule 803(16) (ancient documents), rule 803(17) (published compilations), and rule 803(18) (learned treatises). At common law, the public records exception applied only to written hearsay, *see* 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1633, at 623-24, but rule 803(8) refers to "statements" as well as "records," and hence could be interpreted to allow the reception of oral statements. However, the advisory committee's note contains no indication of intent to broaden the exception in this respect, and its reference to "the unlikelihood that [the public official] will remember details independently of the record" as a justification for the exception suggests that the committee was envisioning recorded hearsay. FED. R. EVID. 803(8) advisory committee's note.

Other exceptions could possibly involve nonrecorded statements but are highly likely to involve statements that at least have recorded counterparts. *See* FED. R. EVID. 804(b)(1) (former testimony), 803(22) (judgments), 803(23) (judgments).

The rules that display no preference for recorded evidence are 803(1) (present sense impression), 803(2) (excited utterances), 803(3) (present physical or mental state), 803(4) (statements for medical diagnosis or treatment), 804(b)(2) (dying declarations), 804(b)(3) (statements against interest), 804(b)(4) (statements of personal or family history). The residual exceptions, rules 803(24) and 804(b)(5), also contain no express preference for recorded statements, though their language is flexible enough to allow recordation to be taken into account in deciding whether to receive a statement.

At times, courts administering exceptions that permit the reception of oral hearsay have imposed a preference for documentary hearsay when both documentary and oral statements are available. *See* 5 WIGMORE (Chadbourn ed.), *supra* note 8, § 1450, at 315-16, and authorities cited therein.

80. Broadly speaking, the parol evidence rule excludes (subject to many exceptions) oral evidence that is offered to vary the terms of a written contract. *See* C. MCCORMICK, *supra* note 8, §§ 210-222, at 426-54. Time and again, evidence and contract writers have insisted that the rule is a rule of substantive law, not a rule of evidence. In a characteristically emphatic passage, Wigmore wrote that "[f]irst and foremost, the rule is in no sense a rule of Evidence, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved." 9 WIGMORE ON EVIDENCE, *supra* note 3, § 2400, at 3 (emphasis in original). *Cf.* A. CORBIN, CORBIN ON CONTRACTS 535 (one vol. ed. 1952) (parol evidence rule "is not a rule as to the admissibility of testimony"). It seems unlikely, however, that the rule is completely untarnished by the desire to exclude unreliable testimony. While there are other reasons for giving primacy to written agree-

written testaments,<sup>82</sup> the best evidence rule,<sup>83</sup> and, in some jurisdictions, the dead man's statute.<sup>84</sup> But for these other rules, the hearsay rule would no doubt exemplify an even more marked preference for recorded statements.

To some extent, this preference for documentary hearsay can be reconciled with the untested declarant rationale.<sup>85</sup> However, the preference also reflects concern about misreport and fabrication by the in-court witness. It is harder to forge a document than to fabricate an oral statement, and if a document is authentic, there is absolutely no danger that the in-court witness will accidentally or intentionally misstate the hearsay declarant's utterance.

The preference for documentary statements probably also reflects a concern for unfair surprise at trial. Documentary evidence, or at least documentary evidence that is to be introduced as an exhibit in the case in chief, is more likely to be discovered by the opponent before trial

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ments, the rule is at least partly based upon the danger that jurors will overvalue testimony about oral agreements. As Murray has written,

[T]here is a tendency to neglect what has been called the *procedural* function which the rule also serves. . . . In determining whether a writing prevails over an oral expression of agreement, a jury may fail to adequately consider the relative unreliability of the oral expression. The writing is unchanged at the time of trial, but the recollection of the party who is urging the choice of the oral agreement is subject to a favorable modification of the actual oral expression, and such a modification may occur quite unconsciously. Judges recognized the general lack of sophistication in juries when it came to making a choice between the written and oral manifestations of agreement. Thus, they reserved to themselves the determination of the question of fact involved, to wit, was there really an oral agreement and, if so, did the parties intend to abandon it when they expressed themselves in writing?

J. MURRAY, MURRAY ON CONTRACTS 228 (1974) (emphasis in original) (footnote omitted); accord C. MCCORMICK, *supra* note 8, § 210, at 427-29 (jury unlikely to take sufficient account of unreliability of witness' memory of oral contract; parol evidence rule protects against "the sympathetic, if not credulous, acceptance by juries of fabricated or wish-born oral agreements.").

81. Virtually every state has a "statute of frauds" requiring certain types of contracts to be in writing. See J. MURRAY, *supra* note 80, at 640. As the name suggests, the primary purpose of the statute of frauds is to prevent fraudulent claims based upon alleged oral agreements. See A. CORBIN, *supra* note 80, at 371-72.

82. Rules requiring that wills be in writing and that statutory formalities be observed serve two functions: a ritual function designed to ensure that the testator has acted deliberately, and the function of insuring that evidence of the testator's intent is "cast in reliable and permanent form." Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6 (1941).

83. In essence, the best evidence rule prohibits oral testimony about the contents of a writing unless an adequate excuse has been presented for failure to offer the original. See FED. R. EVID. 1001-1008.

84. A "dead man's statute" typically provides that a party may not testify about a communication with a person since deceased in a suit prosecuted or defended by the decedent's estate. See MCCORMICK ON EVIDENCE, *supra* note 6, at 159. The purpose of the statute is to prevent fraudulent claims by survivors against estates of persons whose mouths have been closed by death. *Id.* The Federal Rules of Evidence do not contain a dead man's statute, but a number of state jurisdictions that have adopted the federal rules have retained their dead man's statutes. See Wroth, *supra* note 6, at 1336-37.

85. The person who prepares a document may be more careful about what he states, because the document will be preserved and may be checked by others. This is true, for example, of business records.



than oral hearsay.<sup>86</sup> If the documentary evidence is to be used for purposes other than presentation in the case in chief, then it is likely that it will not be fully admissible as substantive evidence anyway<sup>87</sup> and possibly the hearsay rule erects this barricade against substantive use partly because of fear of surprise.

Concern about surprise and fabrication may also help explain why lawmakers have not created a general exception for statements of unavailable declarants. If the unreliability of the declarant were the only concern, lawmakers might have been more willing to say that when the declarant is unavailable, hearsay evidence should be admitted for what it is worth, since it cannot be replaced by the declarant's in-court testimony. However, if perjury by the in-court witness is an independent concern, then the exclusion of this evidence makes more sense. The danger of perjury is increased by the unavailability of the declar-

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86. Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure gives the defendant a right to inspect and copy documents that "are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Admittedly, rule 16(a)(2) places limits upon the discovery of "internal government documents" and statements of government witnesses. Statements of government witnesses are not discoverable as a matter of right until after the witness has testified on direct examination. Jencks Act, 18 U.S.C. § 3500(a) (1982). However, the types of evidence admissible under the documentary exceptions to the hearsay rule (e.g., business records) generally would not fall within the witness statement protection of the Jencks Act and would be discoverable before trial by the defense. If the defense makes a request for discovery under rule 16(a)(1)(C), then the government acquires a corresponding right to discover defense documents under rule 16(b)(1)(A), subject to similar restrictions applicable to internal documents and statements of witnesses. See FED. R. CRIM. P. 16(b)(2).

In civil cases, parties may inquire about the existence of relevant documents through interrogatories, FED. R. CIV. P. 33, or depositions, FED. R. CIV. P. 30, and may request documents from the other party by designating either an item or a "category" of documents. FED. R. CIV. P. 34. The rule requires that categories of documents be designated with "reasonable particularity," but generalized designations are often permitted when they do not impose an undue burden on the opposing party. See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2211 (1970). A party whose request is rejected on grounds that it is insufficiently specific can, of course, use other discovery devices to learn more about what documents are available and sharpen the request. See *United States v. National Steel Corp.*, 26 F.R.D. 607, 611 (S.D. Tex. 1960). Documents may be obtained from nonparties by subpoena duces tecum in conjunction with a deposition. See FED. R. CIV. P. 45(d)(1). Rule 16 of the Federal Rules of Civil Procedure also gives trial judges authority to require lists of documentary exhibits intended to be offered at trial.

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides qualified work product protection to documents containing witness statements obtained in preparation for litigation, but documents admissible under the documentary exceptions to the hearsay rule are not ordinarily prepared for litigation and hence are discoverable as a matter of course despite rule 26(b)(3).

87. For example, a document containing a prior inconsistent statement that is used to impeach a witness' testimony will ordinarily be admissible only for the light it throws upon the witness' credibility, and not for the truth of the matter asserted in the document. See McCORMICK ON EVIDENCE, *supra* note 6, § 251. The Federal Rules do establish a limited category of prior inconsistent statements that may be used as substantive evidence, but this category applies only to statements made under oath at a "trial, hearing, or other proceeding, or in a deposition." FED. R. EVID. 801(d)(1)(A).

ant.<sup>88</sup> Thus, the hearsay rule may reflect in part the policies that were served by the dead man's statutes.<sup>89</sup> (In a well-known but rarely imitated statute creating a broad exception for statements of deceased persons, Massachusetts lawmakers included a requirement that the judge make a preliminary determination that the out-of-court statement was *in fact made*, a requirement that suggests fear of perjury by the in-court witness.<sup>90</sup>)

The concern about surprise is, of course, also reflected in provisions that require notice of intent to produce hearsay — for example, in the residual exceptions to the Federal Rules of Evidence,<sup>91</sup> and in the comprehensive reform accomplished by the English Civil Evidence Act of 1968.<sup>92</sup> Although hearsay scholars have tended to overlook surprise prevention as a possible goal of the traditional exceptions, codifiers are willing to embrace it as a goal when crafting broad new hearsay exceptions.

The existence of what I will call “transaction exceptions” to the hearsay rule probably also reflects concerns about surprise and fabrication. By “transaction exceptions” I mean to refer to exceptions that admit out-of-court statements that are part of the same general transaction or occurrence as independently admissible nonverbal conduct. Examples include the present sense impression and excited utterance exceptions (in most of their applications),<sup>93</sup> and statements

88. Cf. FED. R. EVID. 803(b)(4) advisory committee's note to original rule (emphasis added) (citation omitted):

The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, *enhanced in either instance by the required unavailability of the declarant.*

89. See note 84 *supra* and accompanying text.

90. Since 1898, Massachusetts has had a statute making statements of decedents broadly admissible in civil actions. The current version of the statute reads as follows:

In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

MASS. ANN. LAWS ch. 233, § 65 (Michie/Law Co-op 1986). Cf. R.I. GEN. LAWS § 9-19-11 (1985) (making declarations of a deceased person admissible if made in good faith, prior to the commencement of the action and with actual knowledge).

The Massachusetts approach has not spread, though a few states have enacted much more limited statutes for cases involving suits by or against the estates of decedents. See 5 WIGMORE (Chadbourn ed.), *supra* note 8, § 1576.

91. See FED. R. EVID. 803(24), 804(b)(5).

92. For a description of the British reform, see note 237 *infra*.

93. See FED. R. EVID. 803(1), 803(2). The present sense impression exception, which requires that the statement be made while the declarant was perceiving the event that the statement describes or “immediately thereafter,” virtually insures temporal and spatial unity between the event and the statement. FED. R. EVID. 803(1). The excited utterance exception receives statements made while still under the influence of excitement caused by the event, and hence permits a greater lapse of time. See, e.g., *Cestero v. Ferrara*, 57 N.J. 497, 273 A.2d 761 (1971) (statement

that creep in under the nonhearsay rubric of “verbal act” or “verbal part of an act.”<sup>94</sup> Evidence scholars will recognize these as being part of what was once admitted under the vague label “res gestae.”<sup>95</sup> Now, some of these exceptions can be justified on grounds of declarant reliability — the present sense impression exception is an example.<sup>96</sup> The excited utterance exception, however, can hardly be defended on this ground — indeed, the better view seems to be that excited utterances are *less* reliable than unexcited ones.<sup>97</sup> The best reason that the advisory committee, which was wedded to the untested declarant theory, could give for retaining the excited utterance exception was that it had the sanction of precedent.<sup>98</sup> Yet the excited utterance and the other “res gestae” utterances have some features that make them easy to accept even if they lack indicia of reliability. They are connected with the principal transactions that formed the basis for the lawsuit; hence, if we use a notice approach to hearsay that mimics “transactional” approaches in other procedural contexts (such as relation back of amendments)<sup>99</sup> where the goal is avoidance of surprise, then the “res gestae” exceptions make more sense. When investigating the suit, the opponent would be likely to discover information about statements

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by injured person made approximately half an hour after the event causing injury admissible; excitement had persisted). Usually, however, excited utterances will be made at the same time and place as the event causing the excitement.

94. Examples of such statements include words accompanying the transfer of money, that designate it as a gift, loan, payment, or the like. *See* MCCORMICK ON EVIDENCE, *supra* note 6, § 249, at 732-33. These words are legally operative language that should be admissible under the traditional untested declarant rationale, since they have value regardless of the declarant's reliability. However, because of the inviting vagueness of the terms “verbal act” and “verbal part of an act,” some courts have extended their reach to language that, though contemporaneous with admissible nonverbal conduct, is not legally operative and involves dangers of declarant unreliability. *See* Park, McCormick on Evidence and the Concept of Hearsay, 65 MINN. L. REV. 423, 441-49 & n.80 and authorities cited therein (1981).

95. *See* Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 238-39 (1922); 6 WIGMORE (Chadbourn ed.), *supra* note 8, §§ 1766-1768.

96. The advisory committee's note to rule 803(1) states that the underlying theory of the present sense impression exception is that “substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation.” FED. R. EVID. 803(1) advisory committee's note. Contemporaneity also reduces the danger that defects of memory will render the assertion unreliable.

97. *See* Stewart, *supra* note 28, at 27-29, and authorities cited therein; Hutchins & Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928).

98. The committee wrote that “[w]hile the theory of [the excited utterance exception] has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, . . . it finds support in cases without number.” FED. R. EVID. 803(2) advisory committee's note (citations omitted).

99. *See* FED. R. CIV. P. 15(c) (amendments relate back to the original pleading when they arise “out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading”). *See generally* Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987).

that were part of the same transaction or occurrence as the principal events that formed the basis for the claim or prosecution. Evidence about them would not come as a surprise, and the opponent would be armed with witnesses who could explain, rebut, or contradict them, or testify that they were fabricated. Also, since "res gestae" statements have to occur at the same time and place as other relevant conduct, the chance for fabrication by the in-court witness is less; the witness does not have freedom to choose a convenient time and place to hear a fictional declarant or statement, and therefore the witness' fabrication might be exposed by other witnesses or by circumstantial evidence.<sup>100</sup>

The relative absence of dangers of surprise and in-court fabrication may also have contributed to the continuing vitality of the dying declaration exception. This exception, like the excited utterance exception, does not readily admit to modern justification under a declarant reliability rationale. Possibly there is something to be said for the idea that a dying person will tell the truth. Yet decay in belief in the after-life has certainly weakened that theory, and modern knowledge about perception weakens the idea that the statement, even if made in good faith, will be accurate.<sup>101</sup> But the substantive use of the dying declaration does not raise the same problems of fabrication and surprise that the substantive use of other victim statements might raise. The lawyer in a homicide case knows to look for and expect a dying declaration. Moreover, the dying declaration must be given within a certain temporal and spatial framework, thus limiting the opportunities for fabrication by the in-court witness (who cannot always choose a convenient time and place to have heard a statement that no one else

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100. The following passage from Professor Morgan suggests that these considerations may have influenced courts that applied the "exception" that later was to evolve, with Wigmore's help, into the excited utterance exception:

As in the preceding class [of utterances contemporaneous with independently admissible nonverbal acts], the utterance is offered for its truth and is hearsay. Its sole guaranty of trustworthiness lies in its spontaneity. . . . In this country but few cases prior to 1880 gave weight directly to the element of spontaneity, and fewer still to the fact that spontaneity was insured by the startling nature of the event. Indeed *contemporaneity rather than spontaneity was emphasized*, although the latter was clearly recognized as highly important. Thereafter such cases are somewhat more numerous; but it is only since the publication of Dean Wigmore's work that this exception to the hearsay rule has gained wide recognition. It is, however, by no means universally accepted, and nowhere is the theory of the exception applied with logical completeness. If spontaneity of itself is to be accepted as a guaranty of trustworthiness, then the subject matter of the declaration should not be limited to the startling event which operated to still the reflective faculties. Yet it is everywhere so limited. There is also a marked tendency in many cases to assume that contemporaneity of utterance and event is a requisite of admissibility, and to argue that it is satisfied where the facts show the utterance unreflective, instead of using lapse of time between event and utterance merely as evidence of lack of spontaneity. *Likewise there is frequent insistence that the utterance be made at the place of the event.*

Morgan, *supra* note 95, at 238-39 (emphasis added) (footnotes omitted).

101. See Nesson, *supra* note 34, at 1374 & n.55.

heard). Moreover, dangers associated with interrogation methods and police influence are reduced by the circumstances. The dying (or apparently dying) person is unlikely to be subjected to the trickery, threats, and promises that may occur during station-house interrogation.<sup>102</sup>

Another feature of the exceptions for dying declarations and excited utterances may make them more palatable to those who are concerned about misreport by the in-court witness. Statements that are admissible under these exceptions are likely to be short and memorable. Thus, there is less danger of unintentional misreport by the in-court witness. (Indeed, while there are admittedly exceptions to this generalization,<sup>103</sup> the exceptions for oral out-of-court statements apply in circumstances in which statements are likely to be brief and simple,<sup>104</sup> while those for documentary statements permit the introduction of longer narrative statements filled with hard-to-remember figures and details. This difference supplies further evidence that a reduction in dangers of misreport often makes hearsay more acceptable.)

Another reason to doubt the validity of reductionist explanations for the exclusion of hearsay may be found by considering the rule against substantive use of prior inconsistent statements. This rule is virtually irrational if one adheres strictly to the untested declarant rationale — *i.e.*, to the theory that the sole reason for excluding hearsay is concern that the declarant's reliability has not been tested by cross-examination in court.<sup>105</sup> Prior inconsistent statements are admissible to impeach the witness, but not for the truth of the matter asserted (subject to modern qualifications to be discussed later).<sup>106</sup> This rule seems ludicrous under the untested declarant rationale, because the declarant *is* in court and *is* subject to cross-examination. It has been feebly defended on grounds that in-court cross-examination comes too late,<sup>107</sup> a point that has been ably refuted.<sup>108</sup>

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102. "The narrow subject-matter scope of the [dying declarations] Rule affords built-in safeguards against abuse." *Senate Hearings, supra* note 49, at 70 (Statement of Judicial Conference of the United States).

103. One example of an exception to this generalization is rule 803(4), statements made for medical diagnosis and treatment. These statements may be lengthy and detailed. However, the statements are usually made to a member of the medical profession, and professional standards of accuracy and the likelihood of contemporaneous recordation reduce the dangers of misreport.

104. *See, e.g.*, the exceptions created by rules 803(1) (present sense impression), 803(2) (excited utterances), and 803(3) (then existing mental, emotional, or physical condition).

105. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 6, § 251.

106. *See* FED. R. EVID. 801(d)(1)(A); text at notes 111-16 *infra*.

107. *See* State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939), which argues that The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate applica-

The prior inconsistent statement rules, if they are not simply arbitrary or accidental, must be explained by some justification other than the untested declarant rationale. Probably a combination of factors explain the persistence of these rules. First, the prior inconsistent statement is not a "transactional" statement; the opposing lawyer would not necessarily learn of it in the investigation of the nonverbal events that give rise to the lawsuit. Nor is it one that the opposing attorney would be entitled to discover before trial as a matter of right.<sup>109</sup> Also, the in-court witness who wishes to concoct a prior inconsistent statement can pick the time and place at which the purported statement was made. Thus, there are dangers of surprise and of fabrication by the in-court witness. Moreover, giving substantive effect to the prior inconsistent statement would have systemic effects on the criminal justice system. When investigators obtained a statement from an accomplice incriminating a defendant, they would have courtroom evidence, not merely an investigative lead. If the accomplice changed his story at trial, the statement could be used as substantive evidence of guilt. This would put a further premium upon vigorous interrogation of accomplices, attempts to extract statements with tricks and with offers of immunity or leniency, slanting of statements by statement-takers, and outright fabrication. Because of the rule against substantive use, however, the prior statement may only be used for the lesser purpose of impeachment, and sometimes not even for that.<sup>110</sup>

The legislative history of rule 801(d)(1)(A) indicates that concern

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tion of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others . . . .

108. In response to the argument set forth in the preceding footnote, McCormick wrote: Yet the fact in the case was that the witness did change his story very substantially; rather than hardening, his testimony yielded to something between the giving of the statement and the time of testifying. This appears to be so in a very high proportion of the cases, and the circumstances most frequently suggest that the "something" which caused the change was an improper influence.

MCCORMICK ON EVIDENCE, *supra* note 6, at 745. McCormick also added that the prior statement is likely to be more reliable than the courtroom testimony because it was made nearer to the event than the testimony. Finally, the trier does have the opportunity to observe the demeanor of the witness. As Judge Learned Hand stated in a much-quoted passage, "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court." *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir.), *cert denied*, 268 U.S. 706 (1925). See also 3A WIGMORE (Chadbourn ed.), *supra* note 8, § 1018, at 996.

109. See FED. R. CRIM. P. 16(a)(1)(A); FED. R. CIV. P. 26(b)(3).

110. Although the Federal Rules permit anyone, including the party who has called the witness, to impeach a witness, see FED. R. EVID. 607, the prevailing view is that a prosecutor may not call a witness solely to put a prior inconsistent statement before the jury, when the prosecutor does not expect to get any helpful courtroom testimony from the witness and when the inconsistent statement is not admissible for substantive purposes under rule 801(d)(1)(A). See *United States v. Hogan*, 763 F.2d 697 (5th Cir. 1985), and authorities cited therein. In such a case, the prosecutor would merely be hoping that the jury would (improperly) use the statement for the

about fabrication by investigators and systemic criminal justice concerns played as much a role in limiting the use of prior inconsistent statements as did the orthodox concern about immediate cross-examination of the declarant. The version of the rule proposed by the advisory committee and transmitted by the Supreme Court to Congress would have permitted the substantive use of any prior inconsistent statement.<sup>111</sup> Opponents of the rule argued that the liberalization would give too much power to investigators, and would encourage fabrication and other misconduct.<sup>112</sup> Influenced by the danger of fabrication by in-court witnesses,<sup>113</sup> the House amended the bill so that it gave substantive effect only to inconsistent statements given under oath, subject to cross-examination, at a trial or hearing or in a deposition.<sup>114</sup> After further revision later in the legislative process, the rule's cross-examination requirement was dropped. In its final form, the rule permits the substantive use of prior inconsistent statements that were "given under oath subject to the penalty of perjury at a trial,

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truth of what it asserts, and hence the statement should be excluded as prejudicial under rule 403. FED. R. EVID. 403.

111. FED. R. EVID. 801(d)(1)(A) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 7, at 27.

112. This concern is reflected in the reasons that the House Committee on the Judiciary gave for amending the prior inconsistent statement rule. *See* note 113 *infra*. *See also House Special Subcomm. Hearings*, *supra* note 50, at 244 (statement of Frederick D. McDonald); *House Evidence Rules Hearings*, *supra* note 43, at 92-93 (statement of Frederick D. McDonald). McDonald argued that if prior inconsistent statements were admissible for substantive purposes, "[t]he power of investigators will be unduly enhanced." *Id.* When an investigator takes a statement, McDonald noted, he will have created admissible evidence even if the witness later makes an inconsistent statement. This power is subject to abuse. An investigator represents only one side, and hence will overlook or fail to uncover facts favorable to the other side. Also, "[t]he proposed rule will place excessive power in the hands of governmental agencies and other organizations whose work includes court use. The rule will tip the scales of justice much more toward agencies, organizations and those few individuals who can afford investigators and away from the less affluent." *Id.* He also stated that

The [proposed] rule [making prior inconsistent statements admissible for substantive purposes] means that investigators, government and otherwise, can — out of court, and out of the presence of anyone — take a statement from anyone and that statement, even be it unsworn, becomes substantive evidence to prove the case if the witness later varies from it. It will make it possible for investigators to create airtight cases long before trial or indictment.

*House Special Subcomm. Hearings*, *supra* note 50, at 244. *See also Senate Hearings*, *supra* note 49, at 302 (statement of Herbert Semmel, Washington Council of Lawyers). *Cf.* State v. Spadafore, 220 S.E.2d 655, 664 (W. Va. 1975).

113. *See* H.R. REP. NO. 650, *supra* note 43, at 13. This report gave two reasons for the Committee's proposed compromise version of the prior inconsistent statement rule:

(1) *unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made*; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

*Id.* (emphasis added). The second reason, insofar as it refers to cross-examination, does not apply to the final version of rule 801(d)(1)(A), but the first reason is still fully applicable.

114. *See* M. GRAHAM, *supra* note 18, at 138-39.

hearing, or other proceeding, or in a deposition.”<sup>115</sup> This rule permits substantive use of grand jury testimony, which need not be under cross-examination. The best explanation for permitting this use of grand jury testimony, while precluding substantive use of informal witness statements, is not that grand jury witnesses are trustworthy, but that witness testimony in a grand jury proceeding is likely to be accurately recorded and will not be fabricated by the in-court witness.<sup>116</sup> To some degree, the testimony is also insulated from the dangers of station-house interrogation, and hence its acceptability is enhanced by the fact that it does not raise the same degree of concern about abuse of power by interrogators as does the reception of informal witness statements.

The admissions exception — or exemption<sup>117</sup> — is also difficult to explain under the untested declarant thesis.<sup>118</sup> Under that thesis, exceptions to the hearsay rule are justified when circumstantial guarantees of trustworthiness compensate for the absence of cross-examination. Yet admissions are not required to be trustworthy. An admission need not have been against interest or have any other indicia of reliability.<sup>119</sup> Commentators have noted this anomaly, and have tended to treat the admissions exception as *sui generis*. The advisory committee, noting that “[n]o guarantee of trustworthiness is required in the case of an admission,” stated that “[its] admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”<sup>120</sup> Other commentators have said that the exception is based upon the notion that a party cannot complain about the party’s own unreliability,<sup>121</sup> or that admissions are received

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115. FED. R. EVID. 801(d)(1)(A).

116. See note 113 *supra* and accompanying text.

117. Following Wigmore, the advisory committee decided to classify admissions as nonhearsay, instead of classifying them as hearsay admissible under an exception. The committee reasoned that “[a]dmissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.” FED. R. EVID. 801(d)(2) advisory committee’s note.

118. For a more extended treatment of this topic, see R. PARK, *THE RATIONALE OF PERSONAL ADMISSIONS* (forthcoming).

119. See FED. R. EVID. 801(d)(2) advisory committee’s note (commenting that “[n]o guarantee of trustworthiness is required in the case of an admission”). See also Morgan, *Admissions*, 12 WASH. L. REV. 181, 182 (1937); 4 WIGMORE (Chadbourn ed.), *supra* note 8, § 1048.

120. FED. R. EVID. 801(d)(2) advisory committee’s note.

121. See E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 266 (1962); C. MCCORMICK, *supra* note 8, § 239, at 503 (“This notion that it does not lie in the opponent’s mouth to question the trustworthiness of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason.”).



as a judicial punishment for inconsistency.<sup>122</sup>

The assertion that admissions are received as a "result of the adversary system" does not, standing alone, justify anything. It amounts to nothing more than saying "that's the way the system operates."<sup>123</sup> The other theories, which are based upon the idea that "you said it and you're stuck with it," do help explain why the exception is emotionally appealing. It seems likely, however, that the exception has maintained its remarkable appeal partly for other reasons, which include the relative absence of problems of surprise, discretion, and abuse of governmental power. Ordinarily, the party against whom an admission is offered will not be surprised by it because the statement came from the party's own mouth. By questioning the client, the lawyer should be able to learn of the admission and prepare to rebut or explain it. Even the totally fabricated admission should not be a surprise to a diligent lawyer; the lawyer would routinely be entitled to know about alleged admissions of the client through discovery, even in criminal cases.<sup>124</sup> Moreover, the rule receiving personal admissions raises no problems of judicial discretion. It is clear and categorical. Finally, the concern in criminal cases that reception of hearsay evidence may lead to abuse of government power has been mitigated by the operation of doctrines other than the hearsay rule. When an admission is offered against the defendant in a criminal case, fifth amendment rules governing confessions serve to regulate the conduct of statement-takers and protect against the reception of evidence created by government coercion.<sup>125</sup>

A related "exception" to the hearsay rule is one that James McElhaney, in a humorous treatment of courtroom oddities, has called the "Cleveland Exception."<sup>126</sup> Under the "Cleveland Exception," any-

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122. See Lev, *The Law of Vicarious Admissions — An Estoppel*, 26 U. CIN. L. REV. 17, 29 (1957).

123. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393, 419 (1984).

124. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure gives the defendant the right, on discovery, to a copy of any written or recorded statement made by the defendant, and to "the substance of any oral statement [by the defendant] which the government intends to offer in evidence . . ." In civil cases, statements by a party are freely discoverable by the party who made them through interrogatories and requests for documents. The work product doctrine does not require a showing of special need for the discovery of the party's own statement. See FED. R. CIV. P. 26(b)(3).

125. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (accused must be informed of rights to counsel and to refuse to answer questions); *Jackson v. Denno*, 378 U.S. 368 (1964) (reception of involuntary confessions violates due process). In applying these constitutional safeguards, the courts have not distinguished between admissions that are confessions (statements directly conceding that the defendant committed the crime) and other admissions offered by the prosecution. See 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 413 (1982).

126. McElhaney, *The Cleveland Exception to the Hearsay Rule and Other Courtroom Oddi-*

thing said in the defendant's presence is admissible against the defendant.<sup>127</sup> This is, of course, a rule of thumb and not formal hearsay doctrine. The presence of the defendant *may* be relevant to admissibility (for example, the presence of the defendant is necessary if a statement is being offered as an adoptive admission), but the presence of the defendant is not conclusive. For example, if the defendant is accused of a bad act and *denies* the accusation, then the statement is not admissible. Yet the persistence of the notion among some trial lawyers that whatever is said in the presence of the defendant is admissible suggests an intuitive feeling that it is fair to admit such statements. The defendant has been put on notice of the accusation or other statement and can take the stand to rebut or explain it. Without defending the purported "rule," I offer its remarkable courtroom vitality as evidence that notice and absence of surprise are considered, consciously or not, to be significant factors favoring the admission of hearsay.

Further evidence of multiple reasons for exclusion may be found in the law regarding declarations against penal interest. The concern about fabrication by the in-court witness explains, in part, the long judicial reluctance to accept declarations against penal interest as an exception to the hearsay rule. At common law, statements against pecuniary or proprietary interest were admissible if the declarant was unavailable; statements against penal interest were not. Thus, the utterances "I gave away my tiara to my oldest daughter" or "I owe Hanson \$500" were admissible under the exception, but "I am the Boston strangler" was not (although of course it could come in as the admission of a party-opponent when the declarant was a party). This result seems at first anomalous under the untested declarant rationale, since a concession that the declarant committed a crime would usually subject the declarant to greater danger than a declaration against financial interest, and therefore would not likely be said unless it was true.

In fact, however, the circumstances under which penal interest statements were made often gave rise to doubts about both the sincerity of the declarant and the truthfulness of the in-court witness. The statement against penal interest often became crucial when it was offered by the defendant as the confession of a third person to the crime with which the defendant was charged. The third person might be

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ties, 1 REV. LITIGATION 93, 112-13 (1980). Cf. McDaniels, *Rule 801: More Than a Definition*, LITIGATION, Fall 1975, at 17 (referring to the same rule as the "Philadelphia Exception").

127. See, e.g., *Di Carlo v. United States*, 6 F.2d 364, 366 (2d Cir. 1925) (Hand, J.) ("It is a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him."). For evidence that this rule of thumb has overseas adherents, see Strachan, *Hearsay — Statements Made Before Defendant*, 120 NEW L.J. 1185, 1185-86 (1970) (complaining about automatic admission of such statements in English magistrates' courts).

unavailable, and there might be great doubt about whether the statement was made, whether it was made voluntarily, and if made voluntarily, whether it was true. Courts were reluctant to admit these statements because of doubts about both the declarant and the in-court witness. McCormick ascribed judicial reluctance to accept the statements to "fear of opening a door to a flood of witnesses testifying falsely to confessions that were never made . . . ."<sup>128</sup> Wigmore recognized that "[t]he only plausible reason of policy that has ever been advanced for such a limitation [excluding statements against penal interest from the exception for declarations against interest] is the possibility of procuring fabricated testimony to such an admission if oral." Typically, he condemned this justification, which does not fit his untested declarant theory, saying that

This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.<sup>129</sup>

The Revised Draft of the Federal Rules of Evidence submitted to the Supreme Court by the advisory committee in 1971 contained an exception that would have received declarations against penal interest freely, even when used to exonerate the accused.<sup>130</sup> The advisory committee recognized that the decisional law manifested a distrust of evidence of confessions by third parties "arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant."<sup>131</sup> However, it expressed the view that questions of fabrication should be "trusted to the competence of juries."<sup>132</sup> After receiving comments from Senator McClellan criticizing this rule, the Supreme Court added a provision that "[a] statement tending to exculpate the accused is not admissible unless corroborated."<sup>133</sup>

The advisory committee revised its note to reflect the change. It noted again the concern about fabrication "either of the fact of the

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128. MCCORMICK ON EVIDENCE, *supra* note 6, at 823.

129. 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1477, at 358-59 (footnote omitted).

130. FED. R. EVID. 804(b)(4) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 6.

131. *See* FED. R. EVID. 804(b)(4) advisory committee's note to proposed rule, *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 6 (emphasis added).

132. *Id.*

133. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 804-12, 804-140 (1985).

making of the confession or in its contents" but maintained that penal interest statements often have the required degree of trustworthiness. It concluded by stating that the corroboration requirement had been added to "effect an accommodation between these competing considerations."<sup>134</sup> Subsequently the House Judiciary Committee proposed an amendment to the rule that would require that an exonerating confession be "clearly" corroborated, expressing a concern that otherwise the defendant's testimony alone would be enough to corroborate the statement.<sup>135</sup> The amendment was accepted by Congress and is contained in the present rule.

This treatment of declarations against penal interest in criminal cases reflects concern for fabrication both by the in-court witness and by the out-of-court declarant, and a distrust of the jury's ability to detect this fabrication. In civil cases, by contrast, declarations against penal interest are freely admissible without any requirement of corroboration. This rule does in this context what I will later argue should be done generally: it creates a distinction between civil and criminal cases, based upon the different institutional considerations and the differences in the type of judgment the trier is required to make.

Throughout this section, I have tried to illustrate that the untested declarant theory is an incomplete explanation of the structure of the hearsay rules. It must be conceded, however, that the untested declarant theory has been a powerful force in shaping the hearsay rules. The theory explains the absence of any restriction on the admission of statements that are not offered for the truth of the matter asserted.<sup>136</sup> The fact that they are admitted freely suggests that once concerns about the reliability of the declarant are removed,<sup>137</sup> other concerns are not strong enough to bar admission. This inference from the admission of statements not offered for their truth is strongest if we focus solely upon rules labeled by current doctrine as "hearsay" and ignore other rules governing the admission of out-of-court statements. Concededly the predominant concern of the hearsay rules is the reliability of the out-of-court declarant; though important, problems with the in-court witness are secondary considerations. However, if we look gen-

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134. FED. R. EVID. 804(b)(3) advisory committee's note.

135. H.R. REP. NO. 650, *supra* note 43, at 16.

136. Under the conventional definition, a statement is not hearsay if it is not offered to prove the truth of the matter asserted. *See, e.g.*, FED. R. EVID. 801(c).

137. Generally, when statements are not offered for the truth of the matter asserted, they do not depend for value on the credibility of the declarant, and hence there is no reason for concern about the declarant's reliability. For examples of special situations in which a statement not offered for the truth of the matter asserted will depend to some degree upon the declarant's credibility, see Park, *supra* note 94, at 426-35.

erally to rules about the reception of out-of-court verbal utterances, then we find a good deal of concern about the in-court witness. The best evidence rule, for example, is a rule of preference based upon the idea that the in-court witness may mistakenly transmit the contents of a document or other recorded utterance.<sup>138</sup> In jurisdictions where they survive, the dead man's statutes reflect concern about fabrication of out-of-court statements.<sup>139</sup> "Substantive" rules about the formalities required for contracts, wills, and other legal acts are partly based upon the idea that ritual informs judgment, and partly upon the idea that oral utterances may be fabricated or erroneously reported.<sup>140</sup> The statute of frauds is expressly aimed at fabricated utterances.<sup>141</sup> Were it not for these other rules governing the admissibility of out-of-court verbal utterances, the hearsay rule would most likely reflect concerns of mistake and fabrication in these areas. Of course, there is nothing inherently wrong with doctrinal classification, if it could be done, of evidence rules into those concerned with the untested declarant (hearsay rules) and those concerned with the flawed in-court witness (best evidence rule, dead man's statute, statute of frauds, etc.). Perhaps doctrinal purity would be served by systematically restricting the hearsay rule to situations in which a single concern (the untested declarant) justifies exclusion. Yet this division in principle is a difficult one to maintain in application, since multiple concerns often converge in the context of a single type of statement — such as the confession of a third party offered to exonerate the defendant in a criminal case. Thus, when exclusion of a statement is based in any degree upon concerns about the reliability of the out-of-court declarant, it is convenient to classify that type of statement as "hearsay" and to modify the structure of the rule to reflect additional concerns about witness fabrication.

In this Part, I have attempted to describe how the structure of the hearsay rule is consistent not only with the untested declarant rationale, but also with concerns about surprise and witness unreliability. The fourth concern listed in Part I, the concern about judicial discretion, also permeates the structure of the hearsay rules. The retention of class exceptions, in lieu of adoption of a single broad rule (e.g., that reliable hearsay is admissible), is largely attributable to concern about judicial discretion. The class exceptions limit judicial discretion to exclude hearsay by setting forth specific categories that are not pro-

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138. See FED. R. EVID. 1001-1008 and corresponding advisory committee's notes.

139. See note 84 *supra*.

140. See notes 80-82 *supra* and accompanying text.

141. See note 81 *supra*.

scribed by the hearsay ban. They also limit discretion to admit hearsay — either by setting forth specific rules of exclusion, as in the case of police records,<sup>142</sup> or by restricting the scope of the residual exceptions by negative implication.<sup>143</sup> Moreover, the conditions with which Congress hedged the residual exceptions were intended to limit the discretion of judges to receive hearsay that does not fall under conventional exceptions.<sup>144</sup>

Finally, the structure of the rules excluding hearsay reflects a degree of appreciation of the need for greater protection in criminal cases. As briefly noted above, some exceptions contain express distinctions between civil and criminal cases. One of the most important of these is the public records exception, which became a subject of controversy in Congress because it initially failed to provide adequate protection for defendants in criminal cases. Originally, the Supreme Court transmitted a public records rule recommended by the advisory committee that would have permitted the firsthand observations of police officers to be proven by their police reports, though it would have forbidden the use of public-record “factual findings” by the government in criminal cases.<sup>145</sup> The Federal Rules were amended on the floor of the House to prohibit as well the reception “in criminal cases [of] matters observed by police officers and other law enforcement personnel.”<sup>146</sup>

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142. See text at notes 145-46 *infra*.

143. One can infer by negative implication that hearsay failing to fit a class exception designed to cover the situation presented should also be excluded when offered under the residual exceptions. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1262-64 (E.D. Pa. 1980), *revd. on other grounds sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *revd. on other grounds*, 475 U.S. 574 (1986), *cert. denied*, 107 S. Ct. 1955 (1987); Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 885-88 (1982).

144. See, e.g., REPORT OF SENATE COMM. ON THE JUDICIARY, S. REP. NO. 1277, 93d Cong., 2d Sess. 18-20 (1974), *reprinted in* 1974, U.S. CODE CONG. & ADMIN. NEWS 7051, 7065-66.

145. See FED. R. EVID. 803(8) (Advisory Comm. Revised Draft 1971), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 6, at 106; FED. R. EVID. 803(8) (Supreme Court Proposed Draft 1973), *reprinted in* 2 BAILEY & TRELLES, *supra* note 14, Doc. 7, at 29.

146. FED. R. EVID. 803(8)(B). See 120 CONG. REC. H2387-89 (daily ed. Feb. 6, 1974). The bill's legislative history indicates that the representatives who offered the House amendment were concerned about the lack of cross-examination of the absent police officer. See *id.* at 2387 (remarks of Representatives Holtzman and Dennis), *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 134 (West 1984). Opponents of the amendment objected that police officers were just as reliable as other public servants. See 120 CONG. REC., *supra*, at 2388 (remarks of Rep. Smith), *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 135 (West 1984). The Report of the Senate Committee on the Judiciary characterized the basis for the House amendment as being “that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.” S. REP. NO. 1277, *supra*

The Federal Rules also distinguish between civil and criminal cases in their treatment of declarations against interest,<sup>147</sup> judgments of previous conviction,<sup>148</sup> dying declarations,<sup>149</sup> and former testimony.<sup>150</sup> Like the public records exception, these exceptions are uniformly more liberal in receiving hearsay evidence in civil cases than in criminal cases. Moreover, whatever the specific content of the hearsay rules, the judicial attitude toward exclusion appears to be stricter in criminal cases. Admission of hearsay is more frequently found to be reversible error in criminal cases, indicating that for practical purposes the degree of discretion accorded trial judges is less than in civil cases.<sup>151</sup>

Special concerns about criminal cases have also played a role in the shaping of hearsay rules that do not make an express distinction between civil and criminal cases. One such rule has already been discussed: the provision allowing limited substantive use of prior inconsistent statements. The Court's proposed version of the rule would have allowed unlimited substantive use of these statements, and Congress' decision to limit the exception was apparently based upon concerns about its effect in criminal cases.<sup>152</sup>

In short, the structure of the hearsay rules, as supplemented by other rules excluding out-of-court statements, reflects all of the concerns enumerated in Part I of this article. The development of rules excluding out-of-court statements has been influenced not only by concerns about the untested declarant, but also by concerns about witness

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note 144, at 17, *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 137 (West 1984).

147. See FED. R. EVID. 804(b)(3) (even if it meets the other requirements of a statement against interest, a statement "tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement").

148. Rule 803(22) excludes judgments against persons other than the accused when they are offered by the government in a criminal proceeding for purposes other than impeachment. This provision is a codification of *Kirby v. United States*, 174 U.S. 47 (1899) (in prosecution for possessing stolen postage stamps, confrontation clause prohibits introduction of conviction of another for purposes of proving that the stamps were stolen).

149. FED. R. EVID. 804(b)(2) permits dying declarations to be used in civil cases, but limits their use in criminal cases to prosecutions for homicide.

150. In criminal cases, the former testimony exception applies only if the party against whom the testimony is now offered had motivations and opportunities in a prior action similar to those in the present action to offer the testimony; in civil cases, it also applies if a predecessor in interest had such motivations and opportunities in a prior action. FED. R. EVID. 804(b)(1).

151. See J. WEINSTEIN & M. BERGER, *supra* note 133, ¶ 800[03], at 800-18. Among the reasons mentioned by Weinstein and Berger for this different attitude are the greater chance of prejudice, the influence of the right to confrontation, the limits on the use of extrajudicial statements of accused imposed by the privilege against incrimination and the right to counsel, and the more limited discovery in criminal cases. *Id.* Elsewhere, Weinstein and Berger mention "the frequent in-custody status of witnesses" as a reason for being more chary of hearsay in criminal cases than in civil cases. *Id.* ¶ 800[04], at 800-19.

152. See text at notes 111-16 *supra*.

fabrication, the danger of surprise, problems raised by judicial discretion, and the effect of reception of hearsay upon the criminal justice system. In the next section, I will argue that these concerns justify a more broadly-based distinction between civil and criminal cases.

### III. A SUBJECT MATTER APPROACH TO HEARSAY REFORM

#### A. *Reasons for a Subject Matter Approach*

In this Part of the article, I will argue that hearsay reform should be approached by subject matter, and that civil and criminal cases should be treated differently. I will describe the different considerations raised by admission of hearsay in civil and criminal cases, and propose changes in the Federal Rules of Evidence to take account of differences in the two types of cases.

#### 1. *Hearsay and the Confrontation Clause*

One reason to treat criminal and civil cases differently is that confrontation clause precedent impedes drastic liberalization of the hearsay rules in criminal cases. Any legislative attempt, at either the state or federal level, to make radical changes would invite appellate court litigation defining the extent to which evidence now excluded by hearsay doctrine must be excluded under the confrontation clause. The benefits of codification would be lost. While the confrontation clause could be reinterpreted to clear the way for drastic changes, that process would require an extended period of litigation and the overruling of a substantial body of Supreme Court precedent.

The confrontation clause of the sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>153</sup> The language of the amendment does not provide clear guidance about hearsay issues. It is susceptible to a variety of plausible textual interpretations. Under one interpretation, all hearsay declarants whose statements are offered by the prosecution would be considered "witnesses against" the defendant, and therefore the Constitution would require that the defendant be confronted by them at trial. This interpretation would lead to the exclusion of all hearsay, even hearsay that fell under an exception established at the time of the adoption of the amendment. Alternatively, one could interpret the amendment to require merely that the defendant be confronted with whatever witnesses the prosecution chose to produce at trial. Under this interpretation, trial witnesses could testify

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153. U.S. CONST. amend. VI.



about hearsay declarations, and the confrontation clause would impose no limits upon the creation of new hearsay exceptions. It would merely require the presence of the defendant when evidence was presented to the trier of fact.<sup>154</sup> The amendment could also be construed so that "witnesses against" the defendant referred only to persons who were available to testify. Under this interpretation, the prosecution would be required to produce declarants for cross-examination when possible, but the statements of unavailable declarants could be freely admitted.<sup>155</sup>

The historical background of the amendment does not provide clear guidance in choosing between these or other interpretations. As Justice Harlan suggested, the confrontation clause "comes to us on faded parchment."<sup>156</sup> The confrontation clause was included in the Bill of Rights without congressional debate about its meaning,<sup>157</sup> and speculation about the scope of the clause has centered upon the legal and political climate at the time rather than upon statements made in debate.<sup>158</sup> One tradition holds that the clause was a reaction to the abuses that occurred at the trial of Sir Walter Raleigh in 1603.<sup>159</sup> Unfortunately, even if Raleigh's trial did have a major impact upon the

154. See *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1397, at 131, 134 (confrontation clause should be construed so that it merely requires cross-examination of witnesses who are required to testify in court by the hearsay rules in effect at the time of trial; nothing in the clause should be construed to inhibit revision and extension of hearsay exceptions).

155. See *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring); Westen, *supra* note 8, at 1188-89; Younger, *Confrontation and Hearsay: A Look Backward, a Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

156. *Green*, 399 U.S. at 174 (Harlan, J., concurring). Justice Harlan's historical inquiry led him to the following conclusion:

From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses. That the Clause was intended to ordain common law rules of evidence with constitutional sanctions is doubtful, notwithstanding English decisions that equate confrontation and hearsay. Rather, having established a broad principle, it is far more likely that the Framers anticipated it would be supplemented, as a matter of judge-made common law, by prevailing rules of evidence.

399 U.S. at 179.

157. Justice Harlan noted that "[i]t is common ground that the historical understanding of the clause furnishes no solid guide to adjudication." *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring). See also *Green*, 399 U.S. at 176 & n.8 (citing 1 ANNALS OF CONG. (1789-1790)) (Justice Harlan noted "the prevailing view" that "the usual primary sources and digests of the early debates contain no informative material on the confrontation right.").

158. In support of his position in *Green* that the confrontation clause excludes only the testimony of available witnesses, Justice Harlan found a "glimmer" of illumination in a brief statement made during the debate on the sixth amendment's companion provision giving the defendant the right to compulsory process. The glimmer is, however, a very faint one. See *Green*, 399 U.S. at 177 (quoting statement in debate indicating that the compulsory process clause was understood by one debater as requiring only that defendant be able to compel the attendance of witnesses who are available at the scheduled time of trial).

159. See, e.g., F. HELLER, THE SIXTH AMENDMENT 106-07 (1951).

framers of the amendment, it provides little guidance about the scope of the amendment in cases of less flagrant abuse. If the amendment was intended to prohibit the type of conduct that took place at Raleigh's trial, all that we know is that patently unreliable accusations made by an accomplice while in custody should not be admitted (at least when the accomplice is readily available for testimony),<sup>160</sup> and perhaps that anonymous rumors from declarants without personal knowledge should be excluded as well.<sup>161</sup> The hearsay rule could be radically revamped without infringing upon the principle that such testimony must be excluded. Of course, the fact that the framers to some extent may have had Raleigh's trial in mind does not mean that they intended to prohibit only the specific abuses that occurred at that trial.

Other historical evidence suggests that the framers may have been reacting to a more recent event: the use of vice-admiralty courts by the Crown to prosecute colonists for trade offenses.<sup>162</sup> The vice-admiralty courts were criticized by colonial leaders for substituting civil law procedure for the common-law adversarial system. The right to confront witnesses was possibly intended to protect against perceived abuses of these courts, including the practice of examining witnesses in closed chambers. Again, this hypothesis does not provide clear guidance to contemporary interpretation of the confrontation clause: the framers may have intended to protect only the essentials of common-law adversarial procedure, without necessarily preventing hearsay from being introduced under evolving exceptions.<sup>163</sup>

In an illuminating recent article, Professor Lilly advanced the "tentative hypothesis" that the clause may have done more: it may

160. Raleigh was accused of treason against Queen Elizabeth. The principal evidence against him was the statement of Lord Cobham, an alleged coconspirator, who had incriminated Raleigh in a sworn statement made before trial. Cobham himself was in custody. Raleigh unsuccessfully demanded that Cobham be produced for live testimony, claiming that "he is in the house hard by, and may soon be brought hither." J. PHILLIMORE, *HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE* 158 (1850).

161. The evidence against Raleigh also included testimony by one Dyer, a pilot, who testified that

Being at Lisbon, there came to me a Portugal gentleman, who asked me how the King of England did, and whether he was crowned? I answered him, that I hoped our noble King was well, and crowned by this; but the time was not come when I came from the coast of Spain. "Nay," said he, "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."

*Id.* at 162. To this Raleigh replied, "This is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?" *Id.*

162. See Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. F.L.A. L. REV. 207, 210-12 (1984); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 104 n.23 (1972).

163. See Lilly, *supra* note 162, at 211-12.

have given constitutional status to contemporaneous common-law doctrine excluding hearsay statements of available declarants.<sup>164</sup> Certainly this is one plausible interpretation of the historical record, though hardly a conclusive one. It rests not on the expressed intent of the framers, but upon the existence of common-law doctrine of which they might have been aware, and which they might have intended to constitutionalize. As Professor Lilly recognizes, the historical record is hardly conclusive, and could even be interpreted to support Wigmore's thesis that the confrontation clause does not apply when hearsay is received under an exception recognized by the rules of evidence in effect at the time of trial.<sup>165</sup>

Viewed as an original matter, the language and history of the sixth amendment do not pose an insuperable barrier to radical alteration of the hearsay rule. Its text is susceptible to an interpretation that would liberate the hearsay rule from constitutional constraints. Even assuming the propriety of a strict intentionalist perspective, the history of the amendment does not provide a clear basis for rejecting such an interpretation. Nonetheless, the sixth amendment is an obstacle to radical reform given the established body of judicial precedent that interprets the amendment as putting substantial restrictions on the admission of hearsay.

The Supreme Court has never adopted either of the extreme interpretations of the confrontation clause. In its first case interpreting the clause, it rejected the absolute exclusion view by recognizing that dying declarations were admissible, despite the fact that the defendant had never confronted the declarant.<sup>166</sup> Four years later, the Court effectively rejected the view that the confrontation clause allows unlimited legislative creation of new hearsay exceptions, by holding unconstitutional a federal statute that permitted a third party's conviction to be used, in a prosecution for receiving stolen goods, as evidence against the receiver that the goods were in fact stolen.<sup>167</sup> Subsequent cases steered between the two extremes of absolute exclusion of hearsay and absolute deference to hearsay exceptions. It is difficult to generalize about these cases, because they dealt with particular situations

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164. *Id.* at 213-14.

165. *Id.* at 209-10.

166. *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (dictum). See also *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dictum) ("[T]he admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated.").

167. *Kirby v. United States*, 174 U.S. 47 (1899). The actual statute made the conviction *conclusive* evidence that the goods were stolen, but the Court did not rest its decision on this ground. Instead, it made clear that merely admitting the third party's conviction into evidence was a violation of the confrontation clause. 174 U.S. at 55-56, 61.

without establishing a general principle.<sup>168</sup> In the 1980 case of *Ohio v. Roberts*,<sup>169</sup> however, the Court found majority support for an opinion that outlined a general approach to resolving confrontation issues. The *Roberts* Court established a two-pronged test for determining whether the introduction of hearsay violated the confrontation clause.

The first prong of the *Roberts* test requires that the prosecution produce the hearsay declarant or demonstrate that the declarant is unavailable.<sup>170</sup> The scope of this prong is limited, however. It only applies in the "usual" case;<sup>171</sup> the prosecution need not demonstrate unavailability in cases in which the utility of confrontation is "remote."<sup>172</sup>

The second prong of the *Roberts* test requires that the hearsay have "adequate 'indicia of reliability.'"<sup>173</sup> In some cases, this prong requires "a showing of particularized guarantees of trustworthiness." However, the Court recognized that the need for certainty in criminal trials requires more specific guidance.<sup>174</sup> It indicated that deference should be given to established hearsay exceptions, saying that reliability could be inferred "without more" when evidence fell under a

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168. See *Pointer v. Texas*, 380 U.S. 400 (1965) (introduction of testimony from preliminary hearing at which defendant was not represented, and at which he did not cross-examine the witness, violates sixth amendment as applied to states); *Douglas v. Alabama*, 380 U.S. 415 (1965) (allowing prosecutor to, in effect, use accomplice's statement as evidence against defendant is unconstitutional in circumstances of case); *Barber v. Page*, 390 U.S. 719 (1968) (introducing declarant's former testimony against defendant, without sufficient attempt to produce declarant for trial, violates confrontation clause); *Bruton v. United States*, 391 U.S. 123 (1968) (admitting codefendant's confession implicating both defendants violates confrontation clause, despite limiting instruction); *California v. Green*, 399 U.S. 149 (1970) (receiving witness' prior inconsistent statement as substantive evidence permissible under circumstances of case); *Dutton v. Evans*, 400 U.S. 74 (1970) (receiving coconspirator's prior statement to cellmate permissible under circumstances of case).

In a concurring opinion, in *California v. Green*, 399 U.S. at 182, Justice Harlan advocated a general theory — that the confrontation clause required the production of available witnesses, but had no application when the witness was unavailable — but the majority did not adopt it and he soon afterward abandoned it himself. See *Dutton v. Evans*, 400 U.S. at 95-100 (Harlan, J., concurring). Justice Harlan changed his views because he had come to believe that requiring the production of available declarants in every case would be unduly inconvenient and of little utility. His later view was that the confrontation clause should be construed only to guarantee the right to be present at trial and cross-examine the witnesses there presented. In flagrant cases, however, the misuse of hearsay might constitute a violation of due process. 400 U.S. at 98.

169. 448 U.S. 56 (1980).

170. 448 U.S. at 65.

171. "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.

172. 448 U.S. at 65 n.7.

173. 448 U.S. at 66.

174. See, e.g., 448 U.S. at 66 (referring to the "need for certainty in the workaday world of criminal trials" as one reason why, in past cases, the Court had concluded that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection'").

"firmly rooted" hearsay exception.<sup>175</sup>

The *Roberts* analysis appears to remain intact, though shifting majorities and the Court's checkered record on confrontation issues may be reason to doubt the longevity of any theory about the scope of the clause. In the course of holding that *Roberts*' unavailability requirement does not apply to statements received as admissions of a coconspirator,<sup>176</sup> a later majority showed some inclination to limit *Roberts* to its facts.<sup>177</sup> But both majority and dissent in the Court's most recent confrontation clause cases seem to have taken *Roberts* at its word and to have assumed that it states the general framework of analysis.<sup>178</sup>

Whatever the wavering course of its doctrine, the Supreme Court has consistently adhered to the view that the confrontation clause does more than guarantee that the defense has a right to confront only those witnesses the prosecution cares to produce. Judicial interpretation of the clause has given it a substantial role in preventing the free reception of hearsay.<sup>179</sup> While the Court has deferred to firmly established hearsay exceptions,<sup>180</sup> its opinions indicate that novel ones will be subjected to greater scrutiny. This approach is not an inevitable consequence of either the text or history of the confrontation clause, but it manifests an established judicial attitude. Legislation that attempts radical change at either the state or federal level would inevitably meet constitutional challenge — challenge that would, judging

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175. 448 U.S. at 66. The Court indicated in a footnote that dying declarations fell under a "firmly rooted" hearsay exception, and implied that hearsay falling under the business records and public records exceptions would also pass confrontation clause scrutiny, at least where those exceptions were "properly administered." 448 U.S. at 66 n.8. Subsequently, in *Bourjaily v. United States*, 107 S. Ct. 2775 (1987), the Court held that no particularized showing of reliability need be made when evidence meets the requirements of FED. R. EVID. 801(d)(2)(E) (statements of coconspirators).

176. *United States v. Inadi*, 475 U.S. 387 (1986). *Inadi* reasoned that the coconspirators' statements had an evidentiary significance that could not be duplicated by in-court testimony. 475 U.S. at 395.

177. The Court stated that "*Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony." 475 U.S. at 394 (citations omitted).

178. See *Lee v. Illinois*, 106 S. Ct. 2056, 2064-65 (1986); *Bourjaily v. United States*, 107 S. Ct. 2775 (1987). For a useful analysis of the current status of *Roberts*, see *United States v. Bernard S.*, 795 F.2d 749, 753-56 (9th Cir. 1986).

179. See *Lee*, 106 S. Ct. 2056 (1986); cases cited in note 168 *supra*.

180. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (dictum) (confrontation clause does not require additional showing of reliability when case falls within a "firmly rooted hearsay exception"); G. LILLY, *supra* note 21, at 277-78 ("If the statements in question fall within a hearsay exception and thus have the imprimatur of judicial and legislative experience, this fact should weigh heavily in favor of a determination that the right to confrontation has been satisfied.").

from past practice, often succeed. That fact alone provides one reason for not attempting radical reform in criminal cases.

The confrontation clause is not, however, a complete answer to those who advocate liberalizing the hearsay rule in criminal cases. If there are strong functional justifications for relaxing the hearsay rule, then the appropriate legislative course might still be to seek broad reform, and hope that in the long run courts would cooperate by interpreting the confrontation clause to permit such reform to stand. Nothing in the history or text of the clause would render such an interpretation illegitimate. While judicial precedent under the clause is an obstacle to broad reform, ultimately the issue of reform must be judged on its merits. Therefore, I will examine functional considerations that justify maintaining a more restrictive attitude toward hearsay in criminal cases than in civil cases.

## 2. *Unreliability and Misvaluation*

Several differences between civil and criminal cases justify different treatment of hearsay evidence. One major difference lies in the sources of the statements that would become admissible under a liberal view of the admissibility of hearsay. Criminal cases often turn upon the evidence of accomplices and informers. The evidence of accomplices has always been considered suspect because of the motive to shift blame, curry favor, or retaliate against an unfaithful partner.<sup>181</sup> Moreover, accomplice statements that are not admissible under traditional hearsay exceptions<sup>182</sup> are often those given in response to police interroga-

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181. See, e.g., *Lee*, 106 S. Ct. at 2056, 2062 (describing dangers of accepting accusations of accomplices); *State v. Spadafore*, 159 W. Va. 236, 251, 220 S.E.2d 655, 664 (1975) ("Frequently witnesses in criminal cases are implicated in the criminal activity at issue . . . and the prosecutorial authorities can induce fear, a sense of guilt, and panic, in such a way as to cause distortion of the facts."). Suspicion of accomplices has led to judicial instructions admonishing the jury to use caution in evaluating their testimony and, in some jurisdictions, to requirements that testimony of accomplices be corroborated. See 7 WIGMORE (Chadbourn ed.), *supra* note 8, § 2056.

182. Some of the existing exceptions and exemptions are tailored so that they do not provide a basis for receiving statements of accomplices given in response to police interrogation. For example, the rule exempting coconspirator's declarations requires that the statement be made in furtherance of and during the course of the conspiracy, in effect preventing the reception of statements obtained by station house interrogation. See FED. R. EVID. 801(d)(2). The rule permitting substantive use of prior inconsistent statements would, as originally proposed, have permitted the reception of statements obtained during interrogation when the witness testified inconsistently on the stand, *see text at note 111 supra*, but the rule was amended in Congress so that it now applies only to statements given under oath in a trial or other proceeding. See FED. R. EVID. 801(d)(1)(A). The statements may still be usable for impeachment, but not if the prosecutor's sole purpose in calling the witness is to put the statement before the jury. *See note 110 supra*. The declaration against interest rule does not, however, contain any express prohibition of use of accomplice statements or use of statements obtained during interrogation. A provision that would have attempted to codify the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968), by providing that the exception did not cover "a statement or confession offered against

tion, with the police interrogators playing on the subject's desire to shift blame.<sup>183</sup> Informers, by the nature of their work, lead lives of pretension and duplicity and are often susceptible to pressures to incriminate others.

The unreliability of informers and accomplices would not be a reason for excluding their hearsay statements if the jury could assess them accurately. Yet the problem of assessment is quite different from that presented by the ordinary witness in a civil case. It is easy to understand, for example, how the interest of a party in a civil case might influence the party. The assessment of reliability of an informer or accomplice requires an understanding of institutional practices with which jurors have had little experience. Jurors must take into account methods of police interrogation, the character of someone far outside their usual circles, and the effect of offers of immunity or leniency.<sup>184</sup>

A second source of evidence in criminal cases is police officers and other law enforcement personnel. Here the adversarial nature of their work creates a problem of reliability.<sup>185</sup> However, even if one assumes

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the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused," appeared in the advisory committee's 1971 Proposal and in the House version of rule 803(b)(3), see note 228 *infra*, but was eliminated from the final version of the rules after having been stricken in the Senate. The conference committee reasoned that omitting this provision reflected "the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 12, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7106, and in 4 BAILEY & TRELLES, *supra* note 14, Doc. 16, at 12. Limits on use of statements against penal interest for purposes of incriminating an accomplice of the declarant have therefore been left to case law development under the confrontation clause. For a case in which a declaration against interest was held inadmissible on confrontation clause grounds, see *Lee*, 106 S. Ct. 2056 (1986).

183. For interrogation manuals that describe shifting-the-blame techniques, see R. ARTHUR & R. CAPUTO, INTERROGATION FOR INVESTIGATORS 44-45, 83-84 (1959); A. AUBRY, JR. & R. CAPUTO, CRIMINAL INTERROGATION 121-22 (1980).

184. For example, suppose a case in which the principal witness for the government is an informer who was once part of a drug ring, and who now is testifying for the prosecution in return for leniency. Examination of the witness may reveal bias caused by the offer of leniency, a prior record, a history of drug abuse, participation in the crimes charged, inexplicable lapses of memory, and other defects. It is true that these points could be made, in a less vivid fashion, by impeachment of the witness' out-of-court statement if he did not testify, but the impeachment is likely to lose some of its force. On the stand, the witness' lapses of memory and inconsistencies will be more vivid, and demeanor clues may include nervousness, dullness of affect, unresponsiveness, and even signs of drug use. The jury may not be able to foresee all of these things in its review of an out-of-court statement.

185. While it is difficult to substantiate claims that police perjury is widespread (or that it is not), a number of observers have regarded it as a significant problem in criminal cases. See R. LEMPERT & S. SALTZBURG, *supra* note 27, at 513 & n.28 ("The policymaker cannot ignore a growing body of evidence that perjury is not an uncommon aspect of police work."); Younger, *Constitutional Protection on Search and Seizure Dead?*, 3 TRIAL 41, 41 (Aug-Sep 1967) ("[A]s every lawyer knows who practices in the criminal courts, police perjury is commonplace."); *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363, 364-65 (1972) ("[I]n some thirteen years of practice I have handled perhaps 150 drug cases . . . I cannot recall a single case — not one — where I was not convinced that to a greater or lesser degree the police witness shaped his testimony."); Grano, *A Dilemma for Defense Counsel*, 1971 U. ILL. L.F. 405, 409

as a general matter that police officers are just as reliable as anyone else, the danger that jurors would misvalue their statements would still be a serious concern. If the out-of-court reports and other statements of police officers were to become freely admissible, jurors would often be faced with the naked choice of accepting them or rejecting them. A police report that claims personal knowledge and recounts detailed facts that incriminate a defendant cannot, in the absence of cross-examination, be effectively impeached. The question of impeachment implicates the jury's entire view of the reliability of law enforcement personnel, and its faith in the criminal justice system. Cross-examination is necessary so that individual defects in perception and opportunity to observe can be explored, and can provide grounds for the jury to discount the testimony even if it is unwilling to believe that the testimony is consciously false.

Other dangers would be created by admission of in-court testimony by police officers about the statements of nonpolice declarants. First, this testimony would substitute an experienced professional witness for one who might be more vulnerable to impeachment. Second, the dangers of undetected misreport or fabrication are greater than with other witnesses. As I have argued earlier, it is often difficult to use cross-examination to expose problems of perception and opportunity to observe when the witness is recounting a statement made in private.<sup>186</sup> The confident witness who testifies to certainty about the accuracy of his reporting of a statement forces the trier to decide, not whether he might be mistaken, but whether he is fabricating — either about the degree of certainty or about the statement itself. Cross-examination is probably less useful in exposing fabrication than in exposing defects in memory and perception.<sup>187</sup> Police officers who could freely testify about the statements of others would be tempted to fabricate or exaggerate, with little fear of exposure. The mantle of legiti-

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("[T]he threat of police perjury is much greater than most courts are willing to acknowledge."); A. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982); Oteri & Perratta, "*Dropsy*" *Evidence and the Viability of the Exclusionary Rule*, 1 *CONT. DRUG PROB.* 35 (1971); S. TERKEL, *WORKING* 138 (1974); Wolchover, *Police Perjury in London*, 136 *NEW L.J.* 181-83 (1986) (survey of barristers indicates that 75% agree with estimate that police perjury occurs in three out of ten trials in London criminal courts). For judicial expressions of concern about the possibility of widespread police perjury, see *Briscoe v. LaHue*, 460 U.S. 325, 365 (Marshall, J., dissenting); *Veney v. United States*, 344 F.2d 542, 543 (D.C. Cir.), *cert. denied*, 382 U.S. 852 (1965); *People v. McMurty*, 64 Misc. 2d 63, 64, 314 N.Y.S.2d 194, 196 (N.Y. City Crim. Ct. 1970) (Younger, J.).

186. See text at notes 30-31 *supra*.

187. See Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 *STAN. L. REV.* 682, 690-91 & n.22 (1962) (citing 3 F. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 527 (1960); C. FRICKE, *PLANNING AND TRYING CASES* 367 (rev. ed. 1957); and F. WELLMAN, *THE ART OF CROSS-EXAMINATION* 53 (3d ed. 1924)); Morgan, *supra* note 41, at 186.



macy that comes with the office is a difficult one to penetrate if the jury is presented only with the polar alternatives of believing the officer to be completely truthful or a liar.

A third source of evidence in criminal cases is the defendant himself. Of course, statements by the defendant offered by the prosecution are freely admissible under existing law, unless the statement is a confession obtained by illegal methods.<sup>188</sup> The effect of abolition of the hearsay rule would be to make a defendant's statements admissible on his own behalf. This would encourage defense tactics designed to deprive the jury of the opportunity to observe the cross-examination of the defendant. The defendant is always available for testimony in a criminal case, with the rare exception of cases tried *in absentia* because the defendant has fled after the commencement of trial.<sup>189</sup> Yet, in contrast to civil cases, the defendant cannot be compelled by the opposing party to submit to cross-examination.<sup>190</sup> Abolition of the hearsay rule would allow the defendant to tell his or her story through other witnesses without ever having to submit to cross-examination.

A fourth potential source of evidence is associates of the defendant who are prepared to testify that another person has confessed to the crime charged. Lawmakers have long recognized that this testimony is likely to be unreliable because of fabrication by the in-court witness or the out-of-court declarant.<sup>191</sup> Because of this concern, a provision requiring corroboration of confessions offered to exonerate was included in the Federal Rules of Evidence.<sup>192</sup> The question whether

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188. See FED. R. EVID. 801(d)(2); MCCORMICK ON EVIDENCE, *supra* note 6, § 144.

189. See, e.g., FED. R. CRIM. P. 43 (trial cannot take place in defendant's absence, unless the defendant has voluntarily absented himself after the trial has commenced, or unless the defendant is removed for disruption after having been warned). See generally Cohen, *Can They Kill Me if I'm Gone: Trial by Absentia in Capital Cases*, 36 U. FLA. L. REV. 273 (1984).

190. In criminal cases, the defendant has the right not to take the stand at all, and the prosecution may not comment upon the defendant's refusal to testify. See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 882-86 (1985); Griffin v. California, 380 U.S. 609 (1965). In civil cases, either party may call the opponent as a witness for cross-examination, see MCCORMICK ON EVIDENCE, *supra* note 6, § 121; FED. R. EVID. 611(c), and if the opponent claims a privilege against self-incrimination, the jury may draw inferences from his refusal to testify and the party calling him may comment upon the refusal. See 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2272, at 439 (McNaughton rev. ed. 1961) [hereinafter WIGMORE (McNaughton ed.)]; Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976). Moreover, a number of jurisdictions permit sanctioning a party who refuses to testify with dismissal of the party's case. See Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (1968), and authorities cited therein.

191. See text at notes 128-35 *supra*. Cf. CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, ¶ 229 (1972) (citing danger of manufactured evidence by defendant as reason for more stringent rule governing reception of hearsay in criminal cases). Cf. House Special Subcomm. Hearings, *supra* note 50, at 252-53, 264-65 (testimony of Hon. Henry J. Friendly supporting traditional rule excluding declarations against penal interest).

192. See FED. R. EVID. 804(b)(3); text at notes 130-35 *supra*.

such evidence should be freely admitted is not an easy one,<sup>193</sup> but it must at least be conceded that the circumstances give rise to greater dangers of abuse than exist in civil cases.

Another source of evidence in criminal cases is the victim of the crime. It is risky to generalize about the reliability of victim statements because they cover a broad range. They include the dispassionate statement of the merchant identifying stolen merchandise, the vindictive accusation of the victim of a two-way fight, statements of identification made under a variety of circumstances, and others. It can be said, however, that abolition of the hearsay rule would let in a variety of victim statements that are likely to be unreliable in a way

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193. Because of dangers of declarant unreliability and witness fabrication, it seems clear that such statements should be excluded when the declarant is available for testimony. The out-of-court statement may have been the product of intimidation by the defendant or other improper influence. On the stand, subject to penalties of perjury and (in some cases) to enhanced possibility of punishment for the crime with which defendant is charged, the witness may tell a quite different story. Moreover, the danger that intimidation will influence the testimony is diminished. Violent pretrial intimidation serves a rational preventive purpose — it may cause the witness to give an exonerating statement. Post-trial violence against a witness who has turned against the defendant cannot cure the harm done, and is more dangerous to the defendant, who is a very natural suspect. The witness may realize this and be more forthcoming at trial than in the circumstances in which the pre-trial statement was given.

Even if the declarant is unavailable, substantial arguments can be made for exclusion. First, there is the danger that the declarant is not really unavailable, but is merely being kept out of the way. Secondly, in the case of an indisputably unavailable declarant, the opportunity for in-court fabrication is enhanced because there is no danger that the declarant will appear and withdraw the statement. Once again, the confident witness can confront the trier with the flat alternative of either accepting the testimony or labeling the witness a liar; cross-examination as to perception and memory is likely to be ineffective. *See* text at notes 30-31 *supra*. Moreover, the danger of out-of-court fabrication is greater: the declarant may know at the time that he confesses to the crime with which the defendant is charged that he will not be around to take responsibility, and hence may feel little compunction to tell the truth.

Misgivings about declarant and witness reliability would not be a sufficient basis for excluding exonerating statements were the jury able to evaluate them properly. Certainly, however, there are obstacles to evaluation, especially when the statement lacks the sort of corroboration now required by the Federal Rules of Evidence. The jury is typically faced with a statement which, if both the in-court witness and the declarant are believed, requires a not guilty verdict. The declarant cannot be cross-examined or observed; there may be a wealth of impeaching material that cannot be explored at all, and other material that cannot be explored vividly. The in-court witness can be cross-examined, but the examination is hampered in important respects. The standard of proof is reasonable doubt. Lawmakers believe experience teaches that uncorroborated statements do not generally raise a reasonable doubt. The jury, however, does not deal with the generality of cases, but freshly with the one before it, under strict instructions to resolve doubts in favor of the defendant. If the statement is admitted, it must form a conception of the circumstances under which it was offered, including, for example, the dangers of coercion in settings with which the jury is not familiar, including prisons in which inmates hold as much power as officials. Moreover, the jury must come to a decision without a broad-ranging investigation of all the situational forces at work. If the accumulated experience of lawmakers is that these statements are virtually worthless, then the hearsay rule may be an appropriate way of passing on that experience, at least in cases where the statement is uncorroborated.

Nonetheless, it is difficult to avoid the appeal of Wigmore's argument that "the truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." 5 WIGMORE ON EVIDENCE, *supra* note 3, § 1477, at 289.

that could be illuminated by cross-examination. This is certainly the case with identification statements, which are notoriously unreliable and in need of full exploration.<sup>194</sup> Moreover, incomplete abolition, if it turned upon the discretion of the trial judge, would allow that discretion to be exercised over a wide range of reliable and unreliable statements.

Another feature of criminal cases applies to all of the types of witnesses that I have been describing. Generally, out-of-court statements relevant to criminal cases are made, in the broadest sense, with a view to litigation, or at least with knowledge that the legal process may be brought to bear on the matter being described. This is true whether the statement is a pre-crime statement by someone with knowledge of the alleged plan, or a post-crime statement by an informer, accomplice, police officer, or victim. Statements that fall outside of this category often concern rather unmemorable matters (for example, the appearance of a person who bought an airline ticket) and themselves carry problems of trustworthiness. Moreover, many of the declarants' statements are taken by police, often under interrogation — a process essential in producing investigative leads but not calculated to elicit spontaneous statements that spring from a spirit of candor.

Attempting to draw a general contrast with civil cases is a risky venture. Civil cases fall across a broad range, from complex antitrust litigation to simple personal injury cases, and the persons with knowledge of relevant facts are similarly diverse. Nevertheless, it is fair to note the absence, or at least greatly diminished role, of declarants who are informers, accomplices, or prisoners. Police officers sometimes have relevant knowledge, but the outcome of a case does not normally affect their professional status. The parties may call each other to the stand for cross-examination if self-serving out-of-court statements are introduced by an available opponent. New trials may be granted on behalf of either party if the jury is sufficiently misled by hearsay evidence. Impeachment material is likely to be less rich than in criminal cases, diminishing the need for observation of witnesses as they are confronted with evidence undermining character and credibility. Moreover, achieving a settlement that satisfies the parties may be as important as any other goal. Giving the parties freedom to offer the same evidence that they would use in resolving disputes in ordinary life should promote, not detract from, achieving that goal.

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194. See *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983) (exploring dangers of eyewitness identification and allowing expert testimony on the subject). See generally E. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

### 3. *The Element of Surprise*

In Parts I and II of this article, I described the five principal concerns of the hearsay rule. So far, I have mainly focused in this Part upon the first two concerns: the possible unreliability of an untested declarant, and the possibility of undetected fabrication or misreport by the in-court witness. I now turn to a third concern: the danger of unfair surprise at trial.

The Federal Rules of Civil Procedure provide many techniques by which a litigant may seek to obtain information about hearsay testimony that may be offered by the opposing party. Depositions can be used to explore the knowledge of witnesses, including knowledge obtained by hearsay.<sup>195</sup> The opposing party may be questioned through written interrogatories.<sup>196</sup> Pretrial lists of witnesses and of documents that will be offered in evidence may be required by the court.<sup>197</sup> Prior statements of witnesses may be obtained upon a showing of need,<sup>198</sup> and in some jurisdictions without any showing.<sup>199</sup> In criminal proceedings, the rules of discovery are much more restrictive.<sup>200</sup> For example, under the Federal Rules of Criminal Procedure, depositions are permitted only upon a showing of exceptional circumstances; their purpose is to preserve testimony for use at trial, not to provide discovery.<sup>201</sup> The defendant is not entitled to a transcript of grand jury testimony as a matter of right,<sup>202</sup> and prior statements of prosecution witnesses may be obtained of right only after the direct testimony of the witness.<sup>203</sup>

Of course, in a reform aimed at making hearsay freely admissible in criminal cases, the problem of notice could be handled by making specific notice a precondition for the admission of hearsay, or at least a precondition for admission of hearsay that did not fall under a traditional exception. Yet the influences that now limit criminal discovery would affect this notice provision, either making the reform more limited than what is desired, or making the notice provision partially inef-

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195. See FED. R. CIV. P. 26, 30.

196. FED. R. CIV. P. 33.

197. Rule 16 of the Federal Rules of Civil Procedure gives trial judges authority to require lists of witnesses and documents to be offered at trial, though they are not required to exercise this authority. FED. R. CIV. P. 16; 6 C. WRIGHT & A. MILLER, *supra* note 86, § 1525, at 589 & Supp. (1987), at 316.

198. See FED. R. CIV. P. 26(b)(3).

199. See, e.g., MINN. R. CIV. P. 26.02(3).

200. See generally W. LAFAYE & J. ISRAEL, *supra* note 190, at 725-64.

201. See FED. R. CRIM. P. 15(a).

202. See FED. R. CRIM. P. 16(a)(3).

203. See FED. R. CRIM. P. 16(a)(2); Jencks Act, 18 U.S.C. § 3500 (1982).

fective. In criminal cases, discovery from the prosecution is restricted because of fear of intimidation and fabrication by the defendant. Discovery from the defense is restricted because of concerns about self-incrimination and a feeling that if discovery from prosecution files is limited, reciprocity requires that discovery from defense files also be limited.<sup>204</sup> Witnesses who report hearsay declarations are as vulnerable to intimidation as any other, and defendants can fabricate evidence to counter hearsay declarations as easily as they can fabricate any other evidence. Prosecutors would be reluctant to give notice for the same reason that they are now reluctant to give discovery. Moreover, the uncertainty of a criminal trial, with its turncoat witnesses and surprise testimony, would discourage pretrial notice; parties often do not know that certain evidence is needed before seeing what actually happens at trial.<sup>205</sup> For this reason, the federal courts have shown a marked tendency to ignore the requirement of pretrial notice that is now embodied in the residual exceptions.<sup>206</sup> I am not saying that hearsay reform based upon notice would be totally futile in criminal cases. Certainly a provision making evidence freely admissible upon notice would result in the admission of some evidence that is now excluded. However, there would still be temptations to forego notice in hopes that a traditional exception could be stretched to cover the case<sup>207</sup> or that the judge would ignore the notice requirement. Finally, notice alone would not put the criminal defendant in the same position as a civil litigant. The civil discovery rules provide an opportunity for pretrial examination of available declarants. Armed with information from depositions or discovery of witness statements, the civil litigant is in a better position to decide whether to combat the opponent's hear-

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204. See W. LAFAYE & J. ISRAEL, *supra* note 190, at 725-28.

205. Moreover, the desire for a speedy determination — and, in many jurisdictions, the use of a twelve-person jury — makes it more difficult to give continuances during trial than is the case in civil actions.

206. Both residual exceptions provide that

a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24), 804(b)(5). Several circuits have declined to follow the literal language of the rules. See *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984); *United States v. Heyward*, 729 F.2d 297, 299 n.1 (4th Cir. 1984) (dictum); *Piva v. Xerox Corp.*, 654 F.2d 591, 595 (9th Cir. 1981); *United States v. Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *United States v. Leslie*, 542 F.2d 285, 291 (5th Cir. 1976); *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978). But see *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (notice requirement interpreted strictly); *United States v. Atkins*, 618 F.2d 366, 372 (5th Cir. 1980) (same, in alternative holding).

207. This argument assumes that the traditional exceptions would be retained as a supplement to a notice system. For a discussion of the impracticality of a pure notice system that did not retain traditional exceptions, see Part III.B.2.a.(3) *infra*.

say evidence by calling the declarant for cross-examination. Without such information, calling the declarant is a risky proposition, and trial lawyers are notoriously reluctant to step onto untested ground. To call a witness for cross-examination and then fail to accomplish anything can be a dramatic setback — whatever the judge may have told the jury about the adverse nature of the examination.<sup>208</sup>

The comparisons that I have made between civil and criminal cases describe some particular problems that are created by unreliable declarants, unreliable witnesses, and unfair surprise. A full evaluation of the effect of hearsay exclusion in criminal cases requires a broader perspective, one that considers these particular problems in the context of the role of the hearsay rule in controlling the exercise of governmental power, and that considers as well the systemic effect of the exclusion upon the criminal justice system.

#### 4. *Hearsay and Government Power*

The hearsay rule contributes to achieving two important goals in the criminal justice system: individualization of the determination of guilt, and independence of the decisionmaker. The goal of individualization is achieved when the trier's decision is not a vote of confidence for or against the government, but a unique determination about the guilt of the particular defendant. Independence is achieved when the fact finder is protected from external pressure, free of prejudice, and capable of rendering a final decision that will be respected.

The hearsay rule, by requiring the production of live testimony, serves both of these goals. At the most basic level, a rule preferring live testimony helps keep a trial from becoming a show trial, in which hesitant or inarticulate witnesses are kept offstage, and things move smoothly to a preordained conclusion of guilt. Yet even putting aside the dangers of show trials, the hearsay rule contributes to individualization and independence. Prejudgment is more difficult, and outside pressure is reduced, because no one has the full facts before trial; the results of confrontation, cross-examination, and observation of de-

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208. *Cf.* *United States v. Inadi*, 475 U.S. 387, 409-10 (1986) (Marshall, J., dissenting). In the course of arguing that the confrontation clause required exclusion of the coconspirator's statements if the declarant was available, Justice Marshall stated:

Even when a defendant is in as good a position as the prosecution to subpoena available declarants, a rule requiring him to call those declarants as his own witnesses may deny the defendant certain tactical advantages. . . . [I]f the defendant chooses to call the declarant as a defense witness, defendant risks bolstering in the jury's eyes the very conspiracy allegations he wishes to rebut. That the witness is viewed as hostile by the defendant, and has possibly been certified as such by the trial judge, does not necessarily mean that his relationship to the defendant will be so perceived by the jury, unless defense counsel chooses to dramatize the antagonism with hyperbole that might lose him the sympathy of the jury. 475 U.S. at 409-10.

meanor cannot be known beforehand. The jury is witnessing a unique event. It is charged with determining the credibility of the individuals before it, not the credibility in general of government agents or other classes of absent witnesses. When live testimony is offered in lieu of hearsay, the trier can resolve conflicts of evidence with a legitimacy that cannot be claimed by outsiders. The idea that deference should be given to the body that saw and heard the witnesses is a powerful one. The experience of the jury cannot be described beforehand or duplicated afterwards.

The requirement of live testimony also has an influence upon the government's data gathering. Dossiers are prepared for investigation, not for trial. Statement-takers have less power, and less reason to abuse it. There is less incentive to obtain statements by coercion when those statements will not be admissible, and when the coerced or maltreated witness may, on the stand, reveal what was done. There is less reason to induce witnesses to sign statements that have been distorted by statement-takers. If a witness' statement does not conform to his later live testimony, the statement-taker's distortion may be self-defeating.

Of course, even if the hearsay rule were abolished (and the confrontation clause reinterpreted to permit its abolition), the defendant's right to subpoena witnesses would give the defendant an opportunity to obtain live testimony. Yet the hearsay rule has an independent effect. It discourages the prosecution from keeping witnesses out of the way. Also, the state is much more able to track down witnesses — who can often be elusive in criminal cases — so the hearsay rule shifts a significant practical burden to the party best able to bear it. Furthermore, the defendant has good reason to hesitate before calling a witness for cross-examination when the witness' testimony may be damaging, especially since the defendant does not have the aid of state compulsion in obtaining a pretrial statement from a reluctant or hostile witness.

Finally, the hearsay rule reinforces standard of proof rules that allocate the risk of mistake in criminal cases. Liberalization of hearsay rules could result in an increased number of decisions in which guilt is found despite the presence of a reasonable doubt. To be sure, reasonable doubt instructions will be given whether or not hearsay is admitted, but the admission of evidence that cannot easily be evaluated raises the danger that a mistaken or prejudiced trier will find guilt where an objective observer would find a reasonable doubt.<sup>209</sup> Protec-

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209. To use a quantitative example, suppose that the proponent of hearsay bears the burden of persuasion, the evidence on a crucial element is hearsay, and that an objective educated guess

tion of the values underlying the reasonable doubt standard may require not only that the reasonable doubt instruction be given, but that courts be chary of admitting evidence that could lead to erroneous or lawless determinations of guilt beyond a reasonable doubt.

From both a short- and long-term perspective, the risks of declarant unreliability, witness unreliability, surprise, and discretion are greater in criminal cases than in civil cases. Furthermore, the danger of harmful systemic effects is greater. These considerations justify a different attitude toward hearsay in civil and criminal cases.

## B. *Evaluation of Reform Possibilities*

### 1. *Introduction*

In the foregoing pages, I have attempted to show that the concerns that justify excluding hearsay apply much more strongly in criminal than in civil cases. This section discusses reforms which would implement the view that hearsay should be more freely admitted in civil cases than in criminal cases.

One preliminary question must be addressed: Whether it is wise, even if one recognizes that there are significant differences between civil and criminal cases, to attempt to codify different rules for the two subject matter areas. Such a codification might be objected to on the grounds that it would sacrifice uniformity, thereby making it more difficult for judges and lawyers to perform effectively in both types of cases.

The first answer to this objection is that we already have different rules in criminal and civil cases. To some extent the differences are specifically recognized in the Federal Rules of Evidence,<sup>210</sup> and in confrontation clause case law that supplements the hearsay rule.<sup>211</sup> To some extent they are embodied in the attitude of appellate judges in according less discretion to trial judges who admit or exclude hearsay in criminal cases.<sup>212</sup> Codification of different rules would, in part,

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would place its probative value at 50. Translating standards of proof into rough numerical terms, suppose that the evidence must be given a value of 51 to meet the civil standard, and a value of 95 to meet the criminal standard. If the trier of fact prejudicially overvalues the hearsay by assigning a value of 95, then it will find for the proponent in either a civil or criminal case. In the civil case it will have reached a result that is not far wrong, and that may well be right, given the uncertainties of even an objective guess. In a criminal case, it has reached an unjust result, if we accept as valid the underlying premises of the reasonable doubt standard. The standard of proof in criminal cases gives the trier a larger range over which to overvalue, and hence a greater chance of reaching a patently unjust result.

210. See text at notes 145-51 *supra*.

211. See text at notes 154-80 *supra*.

212. See note 151 *supra* and accompanying text.



merely be a recognition of differences that already exist, and an attempt to make them more clear and explicit.

The second answer is that the benefit of attempting to encourage joint civil and criminal practices by maintaining a superficially uniform hearsay code is dubious. Substantial obstacles already exist to the achievement of a high level of competence on both the civil and criminal sides of litigation. Not only is the substantive law completely different, but there are two different sets of codified procedural rules. Moreover, the additional knowledge needed to accommodate two sets of hearsay rules pales beside the many and changing details that the competent criminal lawyer must keep up with, such as local variations in sentencing practices, in administrative rules of parole and probation, and in rules and practices governing plea bargaining. In any event, codification might clarify differences and make it easier, not harder, to achieve competence in both fields.

Another objection to codification of different sets of rules might rest upon the belief that case law development is preferable to a comprehensive code. Under this view, one might urge that the codified hearsay rules should be simple and permissive, and that they should apply to both criminal and civil cases. Constitutional doctrine under the confrontation clause would then provide additional protections to criminal defendants. The problem with this approach is twofold. First, common-law development of evidence rules left a corpus of law that was fragmentary, confusing, and increasingly ossified. The Supreme Court's sporadic forays into confrontation clause doctrine have not led to any better result. Rules of evidence that must be applied instantaneously in the courtroom need to be as clear and specific as possible. While perfect clarity cannot be achieved by any means, a code offers better chances than case law development.<sup>213</sup> Although no code can completely free the law from the uncertainty of constitutional litigation — the courts must still decide whether hearsay admitted under a code violates the confrontation clause — it can provide substantially greater guidance. Courts are likely to defer to considered legislative judgments that take confrontation values into account.<sup>214</sup> A code that makes an attempt to do so — especially one that seeks to go beyond the minimum protection provided by the Constitution — will provide better guidance than one that turns its back on these values and expressly leaves them to the courts for protection.<sup>215</sup> More-

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213. Cf. Lewis, *supra* note 99.

214. See authorities cited in note 180 *supra*.

215. In their present form, the Federal Rules of Evidence provide substantial guidance. Many of the confrontation problems considered by the Supreme Court have arisen in review of

over, a code that liberalized the hearsay rule for both criminal and civil cases, leaving the protection of criminal defendants to constitutional doctrine, would simply not provide enough protection for criminal defendants. The reasons for excluding hearsay are strong enough in criminal cases to justify legislative recognition. They should not be ignored in favor of an approach that left the protection of confrontation values to whatever the current Supreme Court majority believes is the minimum requirement of the confrontation clause.

Finally, the quest for superficial uniformity in the codified version of the hearsay rules has impeded needed reforms on the civil side. For example, a rule permitting unlimited substantive use of prior inconsistent statements is innocuous in civil cases, and eliminates the need for confusing limiting instructions.<sup>216</sup> Yet because of perceptions about what the rule might lead to in criminal cases, Congress limited it significantly in a fashion that affects both civil and criminal cases.<sup>217</sup> Reform in civil cases deserves to be considered on its merits, without being weighed down with baggage carried over from criminal cases.

## 2. Reform in Criminal Cases

Radical reform should not be attempted in criminal cases. The existing hearsay rules provide needed protection for defendants in criminal cases, and their existence cuts down on the volume of uncertain litigation under the confrontation clause. However, certain interstitial changes might clarify the law, provide additional protection, and bet-

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state court cases in which hearsay was received that would not be admissible under the Federal Rules, absent an expansive interpretation of the residual exceptions. *See Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation clause violated where state courts admitted former testimony that would not have been admissible under federal rule 804(b)(1), the former testimony exception to the hearsay rule); *Barber v. Page*, 390 U.S. 719 (1968) (same); *California v. Green*, 399 U.S. 149 (1970) (no confrontation clause violation with respect to state court's admission of statement from preliminary hearing admissible under current federal rule 801(d)(1)(A) as substantive evidence; remand for further fact-finding regarding reception of statement given to police which would not be admissible under rule 801(d)(1)(A)); *Dutton v. Evans*, 400 U.S. 74 (1970) (no violation where state court admitted coconspirator's statement that would not have been admissible under federal rule 801(d)(2)(E) because it was made after termination of conspiracy) (4-1-4 decision). *Cf. Kirby v. United States*, 174 U.S. 47 (1899) (confrontation clause violated where trial judge admitted judgment of conviction of third person as evidence that goods were stolen; in federal prosecution for receiving stolen goods current federal rule 803(22) would not permit reception of the evidence). *But cf. Lee v. Illinois*, 106 S. Ct. 2056 (1986) (state court's reception of accomplice's confession incriminating both defendant and accomplice violates confrontation clause). The confession in *Lee* might meet the requirements stated in the federal declarations against interest exception, FED. R. EVID. 804(b)(3). Congress decided not to attempt to limit rule 804(b)(3) to meet the requirements of confrontation clause case law. *See* note 228 *infra*. *Cf. United States v. Inadi*, 475 U.S. 387 (1986) (no confrontation clause violation where reception of coconspirator's statement met the requirements of federal rule 801(d)(2)(E); confrontation clause does not impose additional requirement that prosecution show that declarant is unavailable).

216. *See* text at notes 106-08 *supra*.

217. *See* text at notes 111-16 *supra*.

ter inform counsel how to prepare their cases. By crafting the existing hearsay rules in a fashion designed specifically to address the problems raised by admission of evidence in criminal cases, rulemakers might elicit decisions giving the Federal Rules of Evidence the degree of presumptive constitutional validity now accorded to the Federal Rules of Civil Procedure,<sup>218</sup> thereby removing much of the uncertainty that now attends the reception of hearsay evidence in criminal cases.<sup>219</sup>

One topic that could be addressed in codifying criminal hearsay rules is whether and when the unavailability of the declarant is a prerequisite for admission of a hearsay statement. The Federal Rules of Evidence currently require a showing of unavailability as a precondition of admission only when the proponent seeks to invoke one of the five exceptions listed in rule 804. The twenty-four exceptions in rule 803 and the provision admitting co-conspirators' statements contain no express requirement of unavailability. Superficially, it would seem that prosecutors could freely offer evidence under those exceptions even if the declarant were available for live testimony. Yet cases interpreting the confrontation clause have created uncertainty about whether a constitutional requirement of unavailability supplements the requirements of the Federal Rules.<sup>220</sup>

The code should not establish a general unavailability requirement. Clearly, some hearsay should be admissible in criminal cases even if the declarant is available to testify. It would not make sense to require testimony from each person who forms a link in the chain that leads to the creation of a business record,<sup>221</sup> or to exclude the record of a witness' prior conviction on grounds that the trier in the prior case was

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218. See *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965).

219. Courts already give substantial deference to exceptions established in the Federal Rules of Evidence. See note 180 *supra*. Exceptions to this pattern of deference may arise, however, where broad rules covering both civil and criminal cases have been adopted, with the expectation that courts will apply confrontation clause analysis to narrow them in criminal cases. For example, had *Lee*, 106 S. Ct. 2056, involved review of a federal criminal trial, the Court would have been faced with the question whether the reception of evidence falling within the exception created by rule 804(b)(3) violates the confrontation clause. Presumably, the answer would have been that the confrontation clause had been violated. Congress courted this conflict by deciding not to "codify constitutional evidentiary principles" in its final version of rule 804(b)(3). See note 228 *infra*.

220. In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (dictum), the Supreme Court indicated that "[i]n the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." The *Roberts* Court indicated, however, that production of the declarant would not be required where the utility of cross-examination was "remote." 448 U.S. at 65 n.7. Subsequently, in *United States v. Inadi*, 475 U.S. 387 (1986), the Court held that this requirement does not apply to statements offered under federal rule 801(d)(2)(E) as statements of a coconspirator. Its application in other contexts, however, remains unsettled.

221. See *Dutton v. Evans*, 400 U.S. 74, 96 (1970) (Harlan, J., concurring); Kirkpatrick, *supra* note 8, at 698-99.

available to testify under cross-examination about the basis for the verdict.<sup>222</sup> Yet the greater need for protection against hearsay in criminal cases justifies a higher unavailability requirement than that observed in civil cases. Out-of-court statements directly accusing the defendant of a crime should not, for example, be admissible if the declarant is available to testify — though the present hearsay rules, taken apart from the confrontation clause, leave this possibility open.<sup>223</sup> Existing scholarship, though directed at courts interpreting the confrontation clause, could profitably be used by codifiers in attempting to make the unavailability requirement more clear. Possibilities for clarity include general provisions requiring a showing of unavailability when the prior statement is accusatory<sup>224</sup> or when one might reasonably expect that cross-examination would serve a purpose.<sup>225</sup> Alternatively, one might seek greater specificity by examining the exceptions individually, and determining whether an unavailability requirement ought to be imposed upon hearsay admitted under particular exceptions.<sup>226</sup>

The special problems raised by accomplices' and informers' statements could also be dealt with specifically if criminal hearsay rules were codified separately. Specific exclusionary rules could address the problem of statements made while in custody or under interrogation. These statements are generally excluded under existing law,<sup>227</sup> but the residual exceptions and the exception for declarations against penal interest leave open some possibilities for admission.<sup>228</sup>

The hearsay rules could also attempt to address the problem of

222. See Kirkpatrick, *supra* note 8, at 692-93.

223. See *United States v. Barnes*, 586 F.2d 1052, 1055-56 (5th Cir. 1978) (accusatory prior inconsistent statement of accomplice may be admissible under residual exception as substantive evidence against accused) (dictum). Among the exceptions that could be construed to admit accusatory statements despite the declarant's availability are rules 803(1) (present sense impression), 803(2) (excited utterance), 803(6) (business records), and 803(8) (public records).

224. Cf. Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEXAS L. REV. 151 (1978).

225. Cf. Westen, *supra* note 8, at 1195.

226. See Kirkpatrick, *supra* note 8. Kirkpatrick advocates different treatment of different exceptions, and sometimes different treatment of types of statements admissible under the same exception. See *id.* at 697-701 (discussing business records exception).

227. See note 182 *supra*.

228. The version of the Proposed Rules of Evidence transmitted by the Judicial Conference of the United States to the Supreme Court in 1971 contained a provision that would have excluded "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." Fed. R. Evid. 804(b)(4) (advisory comm. revised draft 1971), reprinted in 2 BAILEY & TRELLES, *supra* note 14, Doc. 6. The Supreme Court omitted this provision from the version of the Rules transmitted to Congress. See FED. R. EVID. 804(b)(4) (Supreme Court Proposed Draft 1973) reprinted in 2 BAILEY & TRELLES, *supra* note 14, Doc. 7. The advisory committee's limitation was reinstated in the House, but deleted in the Senate, see H.R. CONF. REP. NO. 1597, *supra* note 182, at 12, and was not enacted as part of the Federal Rules of Evidence. See FED. R. EVID. 804(b)(3). The Conference Report stated that "[t]he Conferees agree to delete the provision regarding statements by a

witness intimidation in criminal cases. Possible reforms include receiving depositions taken under conditions supplying an adequate substitute for cross-examination.<sup>229</sup>

### 3. *Reform in Civil Cases*

In civil cases, problems of declarant unreliability and witness fabrication are probably less serious than in criminal cases because of the different sources from which evidence is derived. Even where these problems exist, the jury is probably in a better position to evaluate the testimony dispassionately and accurately. In any event, the danger of overvaluation of hearsay, while it can never be wholly eliminated, can be reduced by use of procedural devices other than exclusion.<sup>230</sup> Moreover, a relaxed attitude toward reception of hearsay would not undermine the policies served by the reasonable doubt standard in criminal cases, nor is the hearsay rule needed to serve as a shield against misuse of governmental power. Problems of unfair surprise are less serious in civil cases because of the availability of more extensive discovery, and can be further reduced because requirements of notice of intent to introduce hearsay are more feasible in civil than in criminal cases. Finally, problems raised by abuse of judicial discretion can be avoided by adopting a reform that avoids giving judges a general mandate to screen hearsay for reliability.

The balance of this article considers specific means by which broader reform might be accomplished in civil cases.

#### *a. Reforms that eliminate class exceptions*

*i. Pure abolition.* The prospect of completely abolishing the hearsay rule in civil cases has some attractive features. It would minimize judicial discretion and give the fact finder access to a greater quantity of relevant evidence. The danger that proponents would favor second-best evidence would be mitigated to some extent by the fact that the opposing party could ask the trier to draw adverse inferences from the proponent's failure to produce the witness, and, in some cases, by the opponent's own capacity to call the missing witness for cross-examination. The danger that juries would overvalue hearsay would be mitigated by the trial judge's ability to grant a new trial.

However, complete abolition, without any new procedural safe-

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co-defendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H.R. CONF. REP. NO. 1597, *supra* note 182.

229. For a proposal of this nature, see M. GRAHAM, *supra* note 18, at 263-80.

230. See text at note 255 *infra*.

guards, would raise dangers of surprise, fabrication, and jury overvaluation, and would impede the speedy disposition of weak cases. In any event, it is not a politically acceptable solution at this time. The strength of the opposition to lesser measures proposed in the Model Code<sup>231</sup> and in the original Federal Rules of Evidence<sup>232</sup> suggests that complete abolition may be a long way away, even in civil cases.

ii. *A pure reliability rule.* One seemingly simple and effective solution to the hearsay problem in civil cases would be to substitute a single rule for the present system of class exceptions: Hearsay is admissible if it is reliable evidence.<sup>233</sup>

To assess this proposal, one must first ask whether the reliability standard is intended merely to be flexible, or flexible and also discretionary. If the standard is intended merely to promote *flexibility* — that is, to allow trial and appellate judges to take into account *all* of the factors that bear upon the value of evidence, without being restricted to considering the ones identified in particular hearsay exceptions — then appellate courts would be entitled to review trial court

231. The Model Code was never adopted in any state. See 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5005, at 88-89 (1977). The Code would have admitted hearsay freely when the declarant was unavailable, MODEL CODE OF EVIDENCE Rule 503 (1942), and much of the opposition to the Code centered on this aspect. See, e.g., Chadbourn, *supra* note 1, at 945, and authorities cited therein.

232. The 1971 revised draft of rule 804(b)(2) of the Federal Rules of Evidence provided an exception applicable to unavailable declarants that was much more limited than rule 503 of the Model Code. It provided that if the declarant was unavailable as a witness, the hearsay rule did not exclude

[a] statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

FED. R. EVID. (Advisory Comm. Revised Draft 1971), reprinted in 2 BAILEY & TRELLES, *supra* note 14, Doc. 6. This limited rule of preference was rejected by Congress. See 4 J. WEINSTEIN & M. BERGER, *supra* note 133, ¶ 804(b)(5)[04]. A similar rule limited to civil cases might, however, prove more palatable. Weinstein and Berger report:

Probably the most controversial aspect of what was a controversial proposed rule was its extension to criminal cases. Although this was the approach of the Uniform Rules [as well], it is contrary to the practice in most jurisdictions having some form of a recent perception rule. The wisdom of this extension has been questioned by a number of legal authorities who fear that overreaching and unscrupulous prosecutors could take advantage of such an exception to obtain unjustified convictions.

*Id.* at 804-199, 804-200 (citations omitted). Cf. Chadbourn, *supra* note 1, at 951 (expressing qualms about the applying of a similar provision in the Uniform Rules to criminal cases); Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 223 (1960) (same).

233. For commentary favoring a general reliability standard, see Younger, *supra* note 44, at 293; McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 219 (1956). Professor Younger, noting that hearsay is usually admitted, proposes that the rule be reformulated to read as follows:

Hearsay is admissible unless the court decides as a preliminary question that the hearsay could not reasonably be accepted by the finder of fact as trustworthy. The finder of fact remains free to disbelieve admitted hearsay.

Younger, *supra* note 44, at 293.

decisions without giving them special deference, just as they now review personal jurisdiction decisions under a flexible test without giving special deference. If, however, the standard is intended to promote flexibility *and* discretion, then the role of the appellate courts would be minimal, just as it is now in reviewing trial court decisions to grant a new trial because the verdict was against the weight of the evidence.

If the reliability rule was flexible without being discretionary, then it might not have the effect of cutting down on the number and complexity of exceptions, but merely of decodifying them. Case law would once again be the primary source of information about when hearsay could be received. And whatever the value of a multi-factor "balancing test" administered by appellate courts in other contexts, its effect would be chaotic when applied to evidence decisions that need to be made in the heat of trial. Trial judges and lawyers need rules of thumb. Thus, the application of a general reliability standard, after its case law elaboration, would neither clarify nor necessarily liberalize the hearsay rule; it would simply return it to the process of case law development, with the attendant disadvantages of uncertainty and inconsistency. The appellate cases construing the present reliability-based residual exceptions are certainly as much of a hodgepodge as any list of standard exceptions has ever been.<sup>234</sup>

Suppose, however, that a discretionary reliability standard were adopted, one that gave trial judges a great deal of freedom in deciding whether to admit or exclude. An ancient but powerful objection may be made to this approach. Discretion to exclude or admit vital evidence raises dangers of judicial partisanship, corruption, and plain bad judgment. Even with the fairest of judges, it raises the danger that each judge will develop his or her own hearsay "rules," so that to learn how to practice in a given locality would even more than now be a matter of learning how to practice before each particular judge. Also, even if (as would not be the case) litigants could inform themselves during the discovery process about all the items of hearsay the other party would offer, there would still be substantial difficulties in preparing for trial. One would not know whether to prepare to meet, perhaps at great expense, evidence that will be offered by the other party and that might or might not be excluded. One would not know whether to develop alternative sources of proof for one's own evidence that might or might not be admitted. To the degree that disputes about the reception of important evidence are foreseeable, motions in

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234. See generally Sonenshein, *supra* note 143 (Professor Sonenshein illustrates that courts have not interpreted the residual exceptions consistently with their purposes or terms and that courts are divided on the interpretation of the exceptions.).

limine might provide partial relief from uncertainty; but these motions are another procedural complication, and are likely to come only after substantial pretrial preparation has already taken place.

The codified exceptions do, at a minimum, create a core definition of what *is* admissible.<sup>235</sup> For example, admissions of a party-opponent are received without question, as are statements of injured persons about their present symptoms. Under a general reliability test, uninformed by past rules or past practice, there might be some doubt about these propositions.<sup>236</sup> The arbitrary exclusion of hearsay can be as much a danger as the arbitrary admission of hearsay.

If the general reliability test were interpreted as a discretionary standard which permitted the trial judge to freely admit *or* exclude, and to exclude even when evidence formerly fell within a conventional exception, the trial judge would be given extremely broad discretion. The power to exclude crucial evidence is the power to defeat a claim. It would be a discretionary power that allowed the trial judge to terminate a meritorious claim or frustrate a valid defense, without review, often without an effective means of foreseeing the action or avoiding it by careful planning.

*iii. A pure notice system.* Under a pure notice system, hearsay would be admissible if the proponent gave notice before trial of intent to offer it. The notice provision could include a requirement that the location of the declarant be given or, if the location was unknown, that the proponent explain why he was unable to locate the declarant. One might also provide a means for allowing the opponent to require that the proponent either produce a declarant for cross-examination or

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235. See *United States v. DiMaria*, 727 F.2d 265, 270-72 (2d Cir. 1984) (Friendly, J.). The *DiMaria* case holds that statements that fall under the class exceptions to the hearsay rule are admissible even if the trial judge believes them to be untrustworthy.

[T]he scheme of the Rules is to determine [credibility] by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the "catch-all" exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6) . . . .  
727 F.2d at 272. But cf. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 272-74 (1984) (The question of whether trial judges may exclude statements that fall under class exceptions on rule 403 grounds because judges believe hearsay dangers exist is unsettled.).

When evidence is offered against a defendant in a criminal case, the confrontation clause may require an additional showing of indicia of reliability, *DiMaria*, 727 F.2d at 272 n.6, though even in a criminal case the Supreme Court has suggested that "[r]eliability can be inferred without more in a case where evidence falls within a firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (dictum).

236. Admissions are not required to be against interest or otherwise accompanied by indicia of trustworthiness, see text at notes 117-25 *supra*, and hence might sometimes be excluded under a general reliability test. Similarly, the statements of injured persons about their present symptoms, while clearly admissible under federal rule 803(3), can be self-serving when personal injury claims are contemplated, and hence might sometimes be excluded under a general reliability test.



prove unavailability.<sup>237</sup>

The pure notice system has its attractive points. It would address the problem of surprise directly and effectively. It would reduce judicial discretion, at least if it were rigidly applied to require that all hearsay be admitted where notice had been given and all hearsay be excluded where notice had not been given. There would still be dangers of jury overvaluation and lawlessness, but those could be controlled to some extent by the trial judge's power to grant a new trial when the verdict was against the weight of the evidence.

However, the pure notice system, if rigidly followed, could lead to injustices of its own. Its exclusionary impact would be much too great in cases in which notice was overlooked or in which the attorney did not learn of the availability of (or the need for) the testimony until after the period for giving notice had expired. In fact, it would be burdensome even for the most diligent lawyer to give notice of all hearsay that will be offered at trial, including hearsay that is routinely admitted under the current exceptions. A litigant should not be required, for example, to give notice that after the accident (1) the plaintiff complained about pain, (2) then described his symptoms to a doctor who (3) relied upon specified passages from learned treatises in

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237. The British have adopted a notice system for civil trials, though the actual system is more complicated than the one I have described. The notice provisions operate as a residual exception to the hearsay rule; certain class exceptions are retained and evidence is admissible under them even in the absence of notice. Civil Evidence Act, 1968, § 9. If evidence does not fall under a class exception, then it is admissible if the proponent gives notice of intent to offer the evidence. Civil Evidence Act, 1968, §§ 2(1), 8(2). The opponent of the evidence may, however, give counternotice requiring that the person named in the proponent's notice be called as a witness unless shown to be unavailable. Civil Evidence Act, 1968, § 8(3). The notice exception does not apply to second-hand oral hearsay; that is, it does not apply to "evidence other than direct oral evidence by the person who made the statement or any other person who heard or otherwise perceived it" except when the statement was made in a document. Civil Evidence Act, 1968, § 2(3). (The exception for documents may be subject to a requirement that the person making or adopting the document have first-hand knowledge of the matter asserted therein. See R. CROSS & C. TAPPER, *CROSS ON EVIDENCE* 488-89 (6th ed. 1985).) When the notice requirements of the Act have been satisfied, the court has no discretion to exclude the hearsay, see Civil Evidence Act, 1968, § 8(3); J. BUZZARD, R. MAY & M. HOWARD, *PHIPSON ON EVIDENCE* § 17-12, at 355-56 (13th ed. 1982) [hereinafter *PHIPSON ON EVIDENCE*], but the court has discretion to admit hearsay even if notice has not been given. See Civil Evidence Act, 1968, § 8(3); *PHIPSON ON EVIDENCE*, *supra*, § 17-14, at 356-57.

This liberal attitude toward reception of hearsay in civil cases may in part stem from the fact that jury trial is extremely rare in English civil cases. See P. DEVLIN, *TRIAL BY JURY* 130-32 (1966) (noting that jury trial of right is limited to libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise to marry, and fraud cases, and estimating that the proportion of civil jury trials in Britain is two or three percent of all civil cases); Cf. D. CASSON & I. DENNIS, *MODERN DEVELOPMENTS IN THE LAW OF CIVIL PROCEDURE* 6 (1982) (noting limits on jury trial as of right); P. MURPHY & D. BARNARD, *supra* note 19, at 39 (attributing liberality of hearsay rule in British civil cases to circumstance that "the issues of fact are decided by a judge, who is well able to make the proper allowance, when giving judgment, for the fact that some of the evidence has not been subjected to cross-examination"). However, the Civil Evidence Act does not limit the liberalization of the hearsay rule to nonjury cases.

forming an opinion about the plaintiff's condition. An all-embracing notice requirement would be burdensome and frequently overlooked. Stipulating that failure to give notice could be excused if it caused no prejudice would not completely relieve this burden; the careful lawyer, anticipating a claim of prejudice, would still need to submit a detailed and exhaustive list. A notice system ought to be supplemented with a system of class exceptions, under which some hearsay would be routinely admitted even in the absence of notice.

*iv. A pure rule of preference.* If hearsay were treated as a pure rule of preference, then hearsay would be excluded if the declarant were available and admitted if the declarant were not available. The rule would thus give preference to the best evidence (live testimony) but would not stand in the way of admission of evidence when the best was not available.

In its exclusionary aspect, the rule would be too broad unless supplemented with at least a reduced list of class exceptions designed to admit hearsay statements of available declarants when the utility of cross-examination is outweighed by the cost of producing live witnesses. It would be wasteful to require the testimony of every available declarant — for example, every declarant in the chain of information represented by a business record.

A pure rule of preference would also be too broad in its other aspect, that of receiving hearsay not previously admissible. The idea that hearsay should be admitted if the declarant is unavailable is a powerful one if one takes into account only the untested declarant theory, since the choice is between admitting the testimony for what it is worth or losing the benefit of it altogether, and the fact finder ought to be trusted to weigh the evidence for what it is worth. However, when one also considers problems of witness fabrication and surprise, the rule becomes less attractive. The unavailability of the declarant, while it increases the need for admitting the testimony in hearsay form, also increases the danger that the opponent will be surprised by fabricated testimony. The very fact that the declarant is unavailable makes it easier to attribute statements to the declarant that were never made. No one is in a position to contradict the witness' assertion that the declarant made the statement. Therefore, a rule of preference ought to be supplemented with a requirement that the declarant give notice that the statement will be offered. This would allow the opponent to prepare on the question whether the statement was made, whether the declarant was reliable, and whether the declarant is in fact unavailable. In the final part of this article, I will evaluate the possibility of adopting a rule of preference in the context of a system that retains a

list of class exceptions and that supplements the rule of preference with a notice requirement.<sup>238</sup>

*b. Reforms that retain class exceptions*

Probably the best, or at least most feasible, reform under current conditions would be a mixture of those described above, coupled with retention of the class exceptions.

I have tried to demonstrate that, in the absence of complete abolition, retention of the class exceptions would be a useful feature even if the hearsay rule were radically reformed. The class exceptions reduce surprise (the opponent can foresee, and prepare to meet, the types of hearsay that fall under the class exceptions) and curtail trial court discretion (by defining types of hearsay that must be admitted). Retention of the class exceptions as a supplement to a notice system would also reduce pretrial paperwork (no notice need be given when hearsay is admissible under the class exceptions) and prevent reliable hearsay from being excluded for failure to give notice.

But the class exceptions need improvement. Some, like the excited utterance exception, treat a category of hearsay as automatically admissible when its trustworthiness may be no greater than that of ordinary hearsay. Perhaps by broadening the residual exception so that it admits hearsay more freely, pressure could be taken off the class exceptions so that they could be restricted to hearsay that truly deserves automatic admission.

*i. A reliability-based residual exception.* The current Federal Rules of Evidence set forth a system of class exceptions supplemented by a reliability-based residual exception. Rule 803(24), and its twin, rule 804(b)(5), provide:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is not excluded by the hearsay rule], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.<sup>239</sup>

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238. See text at notes 250-55 *infra*.

239. FED. R. EVID. 803(24), 804(b)(5).

This approach is a reasonable compromise. However, it has two defects that limit its utility in civil cases.

First, the notice provision is far too strict. Notice before trial is not always feasible;<sup>240</sup> in any event, a harmless failure to give notice before trial should not result in the exclusion of worthwhile evidence. Good faith failure to give notice should not be grounds for exclusion, unless the other party has been prejudiced by the failure. Even then, a continuance or a rearrangement of the order of proof should be the ordinary remedy. Some courts have reached this result without the aid of any amendment to the rule,<sup>241</sup> but only at the cost of ignoring the rule's plain language. The notice requirement should be liberalized in civil cases.

Second, the rule of preference stated in 803(24) is unduly vague and misconceived in its focus. I am referring to the passage requiring that the hearsay statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."<sup>242</sup> The rule makes no express distinction between available declarants and unavailable ones. When the residual exception is invoked as a basis for introducing the testimony of an available declarant, then the opponent should have the option of requiring the proponent to produce the declarant and elicit the testimony on direct examination. Provision could be made for shifting costs to the opponent if such demands are motivated by a desire to create delay or increase expense.

On the other hand, if the declarant is unavailable, there should be no requirement that the evidence be "more probative" than any other evidence, so long as it meets the test of reliability and is not merely cumulative. If witness *A* testifies that the light was red, and witness *B* testifies that the light was green, then hearsay declarant *C*, who is unavailable, should be heard to say that the light was green, even though we might consider the declarant's evidence not to be "more probative" than that of the in-court witnesses.

These specific defects could, of course, be cured. The residual exception could be revised (in civil cases) so that it provided that upon notice sufficient to prevent unfair surprise (before or during trial),

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240. Even with diligent efforts, it may not always be possible to give notice before trial. The use of hearsay evidence may become necessary because of unanticipated evidence offered by the opponent, because of the unexpected failure of a witness to testify, or because of discovery of new evidence during trial. For examples of cases in which courts circumvented or ignored the pre-trial notice provision of the residual exceptions because notice was not practical under the circumstances, see note 206 *supra*.

241. See note 206 *supra* and cases cited therein.

242. FED. R. EVID. 803(24), 804(b)(5).

hearsay would be admissible when it was reliable enough to be a fair means of proof. This interstitial reliability test would be a useful reform, but its provision for judicial determination of reliability is troublesome and unnecessary. A pure notice-based residual exception would be superior.

In nonjury cases, there is virtually no practical difference between a notice-plus-reliability rule and a pure notice rule. The judge who excludes hearsay evidence as unreliable under a reliability standard would admit it but disregard it under a pure notice standard. So the real question is whether, in civil jury cases, an interstitial reliability test is superior to an interstitial notice rule without reliability screening. The latter approach is preferable for the following reasons:

(a) Reliability screening involves either vesting too much discretion in the trial judge or, as seems to have been the case under the existing residual exception, unnecessary appellate litigation leading to a hodgepodge of appellate precedent that gives little guidance about what is admissible and what is not.<sup>243</sup>

(b) The screening function given to the judge does not take advantage of any qualifications that are peculiar to judges (and not to juries). Unlike other rules that have prophylactic goals, that protect confidential relationships, or that otherwise require a long view of the law, the screening of hearsay merely involves a judgment of its probative value in the case at bar. The jury, if it can be trusted with the testimony of interested parties, convicted felons, and other unreliable witnesses, ought to be trusted with screening hearsay for reliability. Reliability screening makes sense in civil jury trials only if one assumes that juries will fatally overvalue hearsay testimony, and that overvaluation cannot be controlled by other procedural devices. I will argue later that it can be controlled, and that reliability screening is therefore unnecessary.<sup>244</sup>

*ii. A residual exception embodying a rule of preference.* A residual exception embodying a rule of preference would, in its purest form, take the form of a rule that hearsay is admissible when the declarant is unavailable. If the declarant is available, then hearsay would be admissible only if it fell within one of the class exceptions.

The ill-fated Model Code cast the hearsay rule as a rule of preference supplemented by a reduced list of class exceptions.<sup>245</sup> It was never adopted in any state, and its proposed hearsay reform stirred

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243. See generally Sonenshein, *supra* note 143 (analyzing the residual exceptions to the hearsay rule against the backdrop of confused and varying appellate cases).

244. See text at notes 254-58 *infra*.

245. Rule 503 of the Model Code of Evidence provided that "a hearsay declaration is admis-

vehement opposition.<sup>246</sup> Nevertheless, it may be time to reconsider whether the rule of preference might be a valuable reform if limited to civil cases. Even if a pure rule of preference proved unacceptable, compromise models of it are available that meet some of the objections based upon declarant unreliability or witness fabrication. The existing Massachusetts statute<sup>247</sup> and rejected rule 804(b)(2)<sup>248</sup> are examples of limited rules of preference. If broader reform proves unfeasible, these rules could provide a model for more moderate reform in civil cases.<sup>249</sup>

The rule of preference has advantages over current law, but it is not the best solution to the hearsay problem in civil cases. In cases in which the declarant is unavailable, it raises the danger of unfair surprise by omitting any requirement of notice. Notice should be required both to allow the opponent to prepare to impeach or contradict the out-of-court declarant, and to prepare evidence to contest the unavailability of the declarant. A notice system that incorporated a rule of preference that could be invoked only by counter-notice would both allow the opponent to prepare on these points and encourage the parties to agree to the admission of hearsay prior to trial.

Moreover, even if supplemented with class exceptions, a rule of preference would sometimes exclude evidence when the opponent has

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sible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

Other rules provided class exceptions admitting hearsay even when the declarant was available and not present at trial. See, e.g., MODEL CODE OF EVIDENCE Rules 506 (admissions), 512 (contemporaneous or spontaneous statements), 514 (business records), 515 (public records) (1942).

246. See note 231 *supra*.

247. See note 90 *supra*.

248. Rule 804(b)(2) in the form promulgated by the Supreme Court provided an exception, applicable only when the declarant was unavailable, for

[a] statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

FED. R. EVID. 804(b)(2) (Supreme Court Proposed Draft 1973), reprinted in 2 BAILEY & TRELLES, *supra* note 14, Doc. 7.

The House Committee on the Judiciary eliminated the rule as "creating a new and unwarranted hearsay exception of great potential breadth," one which, in the Committee's opinion, applied to statements that did not bear "sufficient guarantees of trustworthiness to justify admissibility." H.R. REP. NO. 650, *supra* note 43, at 6. The rule was not revived and did not appear in the version enacted by Congress.

249. A more comprehensive approach was advocated by Professor James Chadbourn in Chadbourn, *supra* note 1. Professor Chadbourn, though sympathetic with the Model Code's unqualified rule of preference, recognized that it was not likely to be adopted. He proposed a compromise position that distinguished between civil and criminal cases. He proposed adoption of a residual exception providing that "[i]n civil cases a statement by a declarant [is admissible] if the judge finds that such declarant is unavailable and the statement would have been admissible if made by the declarant as a witness." *Id.* at 951.

no actual need for cross-examination and when acquiring the testimony of the witness would be unduly expensive or burdensome. A less categorical preference for live testimony can be built into a notice-based residual exception. The next section of this article advocates such an exception.

*iii. A notice-based residual exception with no reliability screening.*

A notice-based residual exception in civil cases would make no provision for reliability screening by judges, but would depend upon other procedural safeguards to reduce the impact of unreliable evidence. Such an exception has great promise when judged in light of the principal objections to radical reform of the hearsay rule. These objections have been based upon fear that free reception of hearsay would cause surprise at trial, that reform would increase judicial discretion, and that reform would lead to the reception of unreliable evidence.

Objections based upon surprise and discretion do not apply to a pure-notice residual exception. Notice would eliminate surprise, and the trial judge would have no discretion to exclude evidence on grounds that it raised hearsay dangers. Judges would, admittedly, have some discretion in deciding whether late notice was sufficient, but litigants could usually avoid this exercise of discretion by careful planning.

The principal remaining objection to free admissibility is the unreliability of hearsay evidence. This objection can be met by incorporating procedural safeguards into a notice system.

The substitution of hearsay for more reliable live testimony could be avoided by combining a notice system with a rule of preference. The notice of intent to introduce hearsay under the exception should state whether the declarant is available or unavailable. The opponent should have the option of demanding that the declarant be produced at trial and examined, first by the proponent and then by the opponent.<sup>250</sup> If the opponent made such a demand, the proponent should be required either to demonstrate unavailability, produce the declarant, or forego use of the residual exception and attempt to find a basis for admission under a conventional class exception. This procedure recognizes that it is generally appropriate to place the burden of producing a witness upon the party who benefits from the witness' testimony. In cases in which this generalization does not apply, or in which frivolous claims of availability are advanced, the trial judge

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250. The provision that the declarant be examined first by the proponent, rather than merely being offered for cross-examination, would be designed to prevent the proponent from achieving an undeserved tactical advantage. *Cf.* text at note 208 *supra*.

could be authorized to shift costs to the opponent.<sup>251</sup>

Upon notice, hearsay statements of declarants who are unavailable, or who are available and produced for testimony, would be freely admissible. This provision would allow the introduction of prior consistent and inconsistent statements for substantive purposes in civil cases. The right to cross-examine the witness on the stand, coupled with the absence of considerations that make one hesitate to admit such statements in criminal cases,<sup>252</sup> provide an adequate justification for admitting such statements upon proper notice. Of course, the trial judge's power to regulate the taking of testimony under rule 611 and to exclude evidence that is cumulative or a waste of time under rule 403 could be exercised to prevent the witness from taking the stand to read a prepared statement in lieu of ordinary direct examination. The trial judge could, for example, provide that the statement not be admitted until after the completion of the direct examination of the witness on the facts in issue, and then only if the statement was not cumulative or a waste of time.<sup>253</sup>

With this provision, the opponent of the hearsay would be deprived of the opportunity to cross-examine only in cases in which the declarant was unavailable. These cases present the strongest instance for admission of hearsay evidence. The choice is between admitting the untested evidence for what it is worth or having nothing at all. The argument for exclusion rests on the assumption that the jury will fatally overvalue the testimony and that it is better not to hear it at all than to take the chance of overvaluation.<sup>254</sup> This argument is based upon a highly questionable view of the jury's capacities, and in any event to handle the problem by exclusion is to overlook less drastic methods of dealing with the danger of overvaluation. These include argument by counsel about the unreliability of hearsay, judicial instructions about the weight to be given hearsay, judicial comment upon the evidence, and, when things have gone drastically wrong, the use of the judge's power to grant a new trial on grounds that the verdict is against the weight of the evidence.<sup>255</sup>

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251. Both would be subject to the provisions of rule 11 of the Federal Rules of Civil Procedure, which provides for the award of sanctions, including attorney's fees, for the filing of papers that are not well grounded or that are interposed for purposes such as delay.

252. See text at notes 109-10 *supra*.

253. Cf. Civil Evidence Act, 1968, § 2(2) (giving judge discretion whether to admit an out-of-court statement of a person being called as a witness).

254. See text at notes 32-42 *supra*.

255. On the use of these procedural devices to mitigate the possibly prejudicial effect of hearsay, see generally Weinstein, *supra* note 8; 3 J. BENTHAM, *supra* note 1, at 553:

[T]he assumption is, that, if the jury were suffered to hear the evidence, they would be sure to be deceived by it. Experience, had judges but patience to consult her, would have super-



Reliance upon the new trial remedy to correct hearsay-induced miscarriages of justice might, at first, seem to reintroduce all the disadvantages of reliability screening at a later stage, since it does involve a discretionary decision by the trial judge on the basis of an assessment of reliability. However, the new trial approach has advantages over the exclusion approach. First, it allows deliberate consideration of the probative value of the evidence after the reception of all the evidence and of the jury's verdict. Second, it does not finally terminate the case by excluding crucial evidence. It protects the opponent of the evidence against an idiosyncratic first jury, but leaves the proponent, in the absence of settlement, with the opportunity to try the case before a second jury. If the second jury returns a verdict in favor of the proponent, it is highly unlikely that the trial judge will grant a third trial.<sup>256</sup>

Even with these safeguards, the specter of free admissibility of *all* hearsay in civil cases will make this proposal unattractive to many lawyers. The proposal could be limited by restricting the application of the notice-based residual exception to first-hand hearsay from declarants with personal knowledge.<sup>257</sup> This provision would prevent the admission of anonymous rumors and other particularly objectionable hearsay without relying upon discretionary screening. When reliable, double hearsay could still come in under the conventional exceptions to the hearsay rule. A requirement of first-hand hearsay would also limit the impact of the notice-based residual exception upon pretrial disposition of frivolous cases. It would not be possible, if the requirement were imposed and properly tailored, to avoid a motion for summary judgment by alleging facts on information and belief. Rather, a specific hearsay declarant would have to be identified, and the basis for personal knowledge shown.

Finally, rule 403 of the Federal Rules<sup>258</sup> would serve to limit the

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sed the demand for this rash suspicion. Will they be deceived by it? [S]tay and see. Should their decision prove erroneous, then, and not till then, it may be proper to take measures for obtaining a new one.

256. See *Frank v. Atlantic Greyhound Corp.*, 177 F. Supp. 922 (D.D.C. 1959), *aff'd*, 280 F.2d 628 (D.C. Cir. 1960) (trial judge should defer to second jury, in absence of exceptional circumstances); 11 C. WRIGHT & A. MILLER, *supra* note 86, § 2803, at 35.

257. Cf. Civil Evidence Act, 1968, § 2(3) (establishing a general requirement that hearsay testimony about oral out-of-court statement, when admissible under notice-based exception, must be in the form of "direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made"). The goal of this section is to ensure that only first-hand hearsay is admissible under the notice-based exception. See R. CROSS & C. TAPPER, *supra* note 237, at 488.

258. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

admission of hearsay that would be prejudicial, confusing, or a waste of time. In administering rule 403 under a notice-based residual exception, however, trial judges should be required to assume the credibility of declarants in the same way that they must now assume the credibility of live witnesses, and make decisions about confusion, prejudice, and waste of time on the assumption that the declarant's statement is true. Otherwise, rule 403 would become merely another way of adding reliability screening to the decision whether to admit hearsay.

### CONCLUSION

In criminal cases, the currently existing strictures against hearsay should be retained. In civil cases, however, further liberalization of the hearsay rule is justified. The Federal Rules of Evidence should be amended to include a notice-based residual exception that permits hearsay to be admitted in civil cases without being screened for reliability by the trial judge. This approach would eliminate problems of surprise and discretion that have been features of other proposed reforms. The danger of jury overvaluation of hearsay could be adequately met by procedural devices other than exclusion of evidence.